DISTRICT COURT OF THE UNITED STATES
EASTERN DISTRICT OF LOUISIANA,
NEW ORLEANS DIVISION

No. 3667 Civil Action

INDIAN TOWING CO., INC., ET AL

versus

UNITED STATES OF AMERICA

Appearances:
Richard B. Montgomery, Jr., Esq.,
Attorney for Plaintiffs - Appellants

George Blue, U. S. Attorney
Attorney for Appellee

Appeal from the District Court of the United States for the Eastern District of Louisiana, to the United States Court of Appeals for the Fifth Circuit, returnable within forty (40) days from the 20th day of August, 1953 at the City of New Orleans, Louisiana.

LIBRARY
SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~218~~ 4

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1954
CERTIORARI GRANTED OCTOBER 14, 1954

	Page
Caption	1
Complaint	2
Motion to Transfer Case to Eastern District of Louisiana	5
Order Allowing Transfer	7
Motion of U. S. to Dismiss and Reasons In Support Thereof	8
Hearing on Motion to Dismiss & Submission	10
Order Granting Motion to Dismiss & Dismissing Suit	11
Notice of Appeal	12
Bond On Appeal	13
Notice of Appeal	15
Designation of Contents	16
Clerk's Certificate	17
Proceedings in the U.S.C.A. for the Fifth Circuit	18
Argument and submission (omitted in printing)	
Opinion, per curiam	18
Judgment	19
Clerk's certificate (omitted in printing)	
Designation as to the printing of the record (omitted in printing)	
Order granting certiorari	20

COMPLAINT

(Number and Title Omitted)

Filed: August 8, 1952

The petition of the INDIAN TOWING COMPANY, INC., the UPPER MISSISSIPPI TOWING CORPORATION, the MINNESOTA FARM BUREAU SERVICE COMPANY and the UNITED FIREMEN'S INSURANCE COMPANY, with respect represents:

I.

The INDIAN TOWING COMPANY, INC. is a corporation organized and existing under the laws of the State of Louisiana, with its principal place of business in the City of New Orleans; the UPPER MISSISSIPPI TOWING CORPORATION is a corporation duly organized and existing under the laws of the State of Minnesota and a resident of Minneapolis; the MINNESOTA FARM BUREAU SERVICE COMPANY is a corporation organized and existing under the laws of Minnesota with its domicile in St. Paul; and the UNITED FIREMEN'S INSURANCE COMPANY is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of New York.

II.

This cause of action sounds in tort and is brought under Section 1346(b), Title 28 of the United States Code.

III.

That on or about October 1, 1951 the Tug "NAVAJO", owned by the INDIAN TOWING COMPANY, INC., was towing BARGE AS-16, chartered by the UPPER MISSISSIPPI TOWING CORPORATION from the Alexander Shipyards, Inc.; that aboard the said Barge was 1,204.25 tons of triple super phosphate, consigned to the MINNESOTA FARM BUREAU SERVICE COMPANY of St. Paul, Minnesota, and insured under a policy of insurance issued by the UNITED FIREMEN'S INSURANCE COMPANY.

IV.

On or about October 1, 1951 the said Tug "NAVAJO" went aground on Chandeleur Island, and as a result thereof the sea water gained entrance into the cargo space, completely wetting the cargo and damaging said cargo to the extent of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS.

V.

The consignee refused to accept the cargo, and as a result the INDIAN TOWING COMPANY, INC. and the UPPER MISSISSIPPI TOWING CORPORATION, charterers of the BARGE AS-16, became responsible for the loss of the said cargo, and the said loss was paid by the plaintiff, UNITED FIREMEN'S INSURANCE COMPANY under loan receipts.

VI.

The grounding of said Tug "NAVAJO" was due solely to the failure of the light on Chandeleur Island.

VII.

The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation", and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

VIII.

The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7 and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain

the light or to notify vessels that the said light was not functioning.

IX.

As averred, your petitioners have suffered damage through the loss of cargo due to the grounding of the said BARGE AS-16 in the sum of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS.

WHEREFORE, petitioners pray for judgment in the sum of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS against the UNITED STATES OF AMERICA, with interest and costs.

(Sgd.) RICHARD J. MONTGOMERY,
RICHARD B. MONTGOMERY, JR.
1105 Maritime Building
New Orleans 12, Louisiana

ATTORNEYS FOR PETITIONERS

MOTION TO TRANSFER CASE TO EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: September 4, 1952

Comes the United States of America, by Joseph E. Brown, United States Attorney for the Southern District of Missis-

sippi, and moves the Court to transfer this action to the Southern District of Louisiana, New Orleans Division, for the reason that none of the plaintiffs reside in the Southern District of Mississippi and one of the plaintiffs, Indian Towing Company, resides in the Eastern District of Louisiana, and the alleged act or omission complained of occurred on Chandeleur Island in the Eastern District of Louisiana, New Orleans Division. Further, counsel for all of plaintiffs reside in New Orleans. Under Section 1402(b) the venue of this action is not in the Southern District of Mississippi, but in the Eastern District of Louisiana, New Orleans Division, and inasmuch as the venue is there and counsel for all of the plaintiffs reside in New Orleans, this action for the convenience of the parties and witnesses and in the interest of justice should be transferred to the Eastern District of Louisiana, New Orleans Division.

(Sgd.) JOSEPH E. BROWN
JOSEPH E. BROWN
United States Attorney

CERTIFICATE

I, JOSEPH E. BROWN, United States Attorney for the Southern District of Mississippi, certify that I have this day mailed through United States mail, postage prepaid, a copy of the foregoing Motion to Messrs. Montgomery, Barnett, Brown & Sessions, counsel for plaintiffs, whose address is 1103-6 Maritime Building, New Orleans 12, Louisiana, and now give notice to them that the Motion will be presented for hearing to the District Judge in the Court Room

of the United States District Court, 4th Floor, Post Office Building, Jackson, Mississippi at 10:00 o'clock A.M., Thursday, September 11, 1952, or as soon thereafter as it can be heard.

This, September 4, 1952.

(Sgd.) JOSEPH E. BROWN
United States Attorney

ORDER GRANTING TRANSFER OF CASE

(Number and Title Omitted)

Upon motion and suggestion of the United States of America that this cause be transferred to the Eastern District of Louisiana, New Orleans Division, and it appearing to the Court that none of the plaintiffs reside in the Southern District of Mississippi, and that one of the plaintiffs, Indian Towing Company, Inc., resides in the Eastern District of Louisiana, and that the alleged negligent act or omission complained of occurred in the Eastern District of Louisiana, New Orleans Division, this action, for the convenience of the parties and in the interest of Justice, the complainants consenting thereto, is transferred to the Eastern District of Louisiana, New Orleans Division, wherein it might have been originally brought.

The Clerk of this Court is directed to forthwith transmit the file with a copy of this order, to the Clerk of the United States District Court for the Eastern District of Louisiana,

New Orleans Division, at New Orleans, Louisiana.

So ordered this 15th day of September 1952.

S. C. MIZE
UNITED STATES DISTRICT
JUDGE

A TRUE COPY I HEREBY CERTIFY.
B. L. Todd, Jr. Clerk.
(Sgd.) By A. I. HERBERT

(SEAL)

MOTION TO DISMISS AND REASONS IN SUPPORT THEREOF

(Number and Title Omitted)

Filed: December 1, 1952

On motion of the United States of America, defendant, appearing herein through its attorney, Lansing L. Mitchell, Assistant United States Attorney for the Eastern District of Louisiana, and on suggesting to the Court that defendant is entitled to have this suit dismissed and hereby so moves for the following reasons:

(1) The defendant is a corporation sovereign whose consent must be granted before suits of this nature and character can be commenced against,

and that defendant has not consented to be sued in the manner in which this suit is brought in that the damages allegedly sustained by the complainant are of a maritime nature and complainant seeks recovery in a civil action. Defendant has consented to be sued for certain types of maritime torts under the provisions of the Suits in Admiralty Act (46 U.S.C. 741) or the Public Vessels Act (46 U.S.C. 787) and complainant can only find relief from maritime loss under the provisions of the above mentioned statutes.

(Sgd.) LANSING L. MITCHELL
LANSING L. MITCHELL
Assistant United States Attorney
239 Post Office Building
New Orleans, Louisiana

Attorney for Defendant

HEARING ON MOTION TO DISMISS & SUBMISSION

MINUTE ENTRY

January 14th, 1953

Christenberry, J:

(Number and Title Omitted)

This cause came on this day to be heard on motion of defendant to dismiss;

Present:
Lansing L. Mitchell,
Asst. U. S. Attorney;

Richard B. Montgomery, Jr.:
Attorney for plaintiffs;

After hearing argument of counsel for the respective parties, the matter was submitted and the court took time to consider. Counsel for defendant to have 20 days to file brief and counsel for plaintiff to have 10 days thereafter to file reply brief.

ORDER GRANTING MOTION TO DISMISS & DISMISSING SUIT

MINUTE ENTRY

June 29th, 1953

Christenberry, J:

(Number and Title Omitted)

This cause came on to be heard on a former date on the motion of the United States of America to dismiss, and was argued by counsel for the respective parties and submitted when the Court took time to consider;

Now therefore, after due consideration thereof;

IT IS ORDERED that the motion of the United States of America to dismiss is GRANTED, and the suit is hereby dismissed.

(Sgd.) H.W.C.

Elizabeth H. Dalehite, Henry G. Dalehite, Jr. et al.
vs.
United States of America,
U. S. Sup. Ct.,
June 8, 1953.

NOTICE OF APPEAL

(Number and Title Omitted)

Filed: August 20, 1953

Notice is hereby given that the Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, appeal to the Circuit Court of Appeals for the Fifth Circuit from the order rendered on June 29th, 1953 dismissing the above entitled and numbered suit and from the final judgment dismissing the said suit on July 1, 1953.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

BOND ON APPEAL

(Number and Title Omitted)

Filed: August 20, 1953

KNOW ALL MEN BY THESE PRESENTS:

That we, Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, as principals, and Phoenix Indemnity Company, as surety, are held and firmly bound to the United States of America in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the United States of America, or its assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Signed with our seals and dated this 19th day of August, in the year of Our Lord, One Thousand, Nine Hundred and Fifty-three.

WHEREAS, lately a final judgment in the suit pending in the said court as above entitled was rendered against the said plaintiffs Indian Towing Company, Inc., Upper Mississippi, Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, and the said plaintiffs having given notice of appeal and filed a copy thereof in the clerk's office in the aforesaid suit and having served opposing counsel with notice of said appeal;

NOW THE CONDITION OF THE OBLIGATION IS SUCH, That if the said plaintiffs Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company shall prosecute their appeal to the Court of Appeal of the Fifth Circuit to final effect and answer all damages and costs if they fail to make the said appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and Delivered in presence of

_____

Indian Towing Company, Inc.
Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company
Principals

_____

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney

PHOENIX INDEMNITY COMPANY
Surety

(Sgd.) By ROBERT W. BREEDEN, JR.
ATTORNEY-IN-FACT

(SEAL)

NOTICE OF APPEAL

(Number and Title Omitted)

Filed: August 24, 1953

Notice is hereby given that the Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, appeal to the U. S. Circuit Court of Appeals for the Fifth Circuit from the order rendered on June 29th, 1953, dismissing the above entitled and numbered suit and from the final judgment dismissing the said suit on July 1, 1953.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

DESIGNATION OF TRANSCRIPT

(Number and Title Omitted)

Filed: August 24, 1953

Now into court come the plaintiffs in this case and request that the entire record, with the exception of the proof of service, be included in the transcript.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 16 pages to contain a true and correct copy of the record in the case of "Indian Towing Company, Inc. -vs- United States of America" No. 3667 of the Civil Action docket of this court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana this 16th day of September, 1953

A. DALLAM O'BRIEN, JR.,
Clerk

By: (Sgd.) ANDREW J. BACON
Deputy Clerk

MINUTE ENTRY ON ARGUMENT AND SUBMISSION—April 1 1954

[Omitted in printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14747

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, Appellants

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—April 22, 1954

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo," as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U. S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the Delehite case while appellee as vigorously insists that that decision and the decision in the Feres case[1] are controlling here.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act laid down in those cases, the judgment must be affirmed.

Affirmed.

IN UNITED STATES COURT OF APPEALS

No. 14747

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY

versus

UNITED STATES OF AMERICA

JUDGMENT—April 22, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Clerk's Certificate to foregoing transcript omitted in printing.

---

[1] Feres v. United States, 340 U. S. 135.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 213

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U.S.
FILED
DEC 15 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 316

INDIAN TOWING COMPANY, INC.,
UPPER MISSISSIPPI TOWING CORPORATION,
MINNESOTA FARM BUREAU SERVICE COMPANY,
UNITED FIREMEN'S INSURANCE COMPANY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

PETITION FOR WRIT OF CERTIORARI.

CICERO C. SESSIONS,
Attorney for Petitioners.

Of Counsel:
ARTHUR B. HAMMOND, JR.,
RICHARD B. MONTGOMERY, JR.,
1105 Maritime Building,
New Orleans, La.

SUBJECT INDEX

	PAGE
ARGUMENT	5
APPENDIX "A"	17
APPENDIX "B"	19
Dalehite, Elizabeth H., et al. vs. United States of America, 73 Sup. Ct. 956, 346 U.S. 15	2, 5, 11
Foley vs. New York, 294 N.Y. 275, 62 N.E. 2d 69	12, 13
Hernandez vs. United States, 112 Fed. Supp. 369	6, 10
Johnston v. City of East Moline, 405 Ill. 460, 91 N.E. 2d 401	12, 15
Lacy vs. United States, 98 Fed. Supp. 219	6
Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792	6, 11
Moran vs. United States, 102 Fed. Supp. 275	6
Somerset Seafood Company vs. United States, 193 Fed. 2d 631, decided by U.S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court	5
Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court decided by Judge Chestnut	6
Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284	5

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. .....

INDIAN TOWING COMPANY, INC.,
UPPER MISSISSIPPI TOWING CORPORATION,
MINNESOTA FARM BUREAU SERVICE COMPANY,
UNITED FIREMEN'S INSURANCE COMPANY,
Appellants,

versus

UNITED STATES OF AMERICA,
Appellee.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of the INDIAN TOWING COMPANY, INC., the UPPER MISSISSIPPI TOWING CORPORATION, the MINNESOTA FARM BUREAU SERVICE COMPANY, and UNITED FIREMEN'S INSURANCE COMPANY petitioning from a final decree of the United States Court of Appeals for the Fifth Circuit, No. 14,747, in which the said Court of Appeals affirmed a decree of

the United States District Court for the Eastern District of Louisiana. This per curiam decree was rendered by Hutcheson, Chief Judge, Holmes and Borah.

1. The opinion delivered by the Court below is reported in 211 Fed. Rep. 2d 886, a copy of which is annexed hereto, as Appendix "A".

2. The date of the judgment sought to be reviewed is April 22, 1954. The time of its entry is unknown to petitioners. A statement of the grounds on which the jurisdiction of this Court is invoked is as follows:

a. The per curiam decree was rendered solely on the basis that the matter before the Court had been decided by Your Honors, the Supreme Court of the United States, on the authority *Elizabeth H. Dalehite, Henry G. Dalehite, Jr., et al. vs. United States of America*, 73 Sup. 956, 346 U. S. 15.

b. Petitioners aver that the case presented to the United States District Court and to the United States Court of Appeals for the Fifth Circuit does not come under the authority of *Dalehite vs. United States (supra)*, and that the only recourse that petitioners have is this writ of certiorari to this Honorable Court.

c. Petitioners aver that both the Judge of the United States District Court and the Judges of the United States Court of Appeals decided the case solely on the basis of the decision of this Honorable Court and on no other basis. Petitioners will show that the facts of the case at bar are entirely different from the facts of the *Dalehite* case, and that both

courts were in error in deciding the case at bar solely upon the basis of Your Honors' decision.

d. Petitioners show that, if your Honors' decision in the *Dalehite* case is applicable to the case at bar, then Your Honors have completely rewritten the Federal Tort Claims Act, so as to make it inapplicable to any tort claims against the United States of America where there are damages due to automobile accidents.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

3. The question presented for review is whether the United States is liable under the Federal Tort Claims Act, Section 1346(b), Title 28 U.S.C., for damage to cargo resulting when a tug towing a barge was grounded on an island due to the negligence of the Coast Guard in maintaining and servicing the island navigational aid light.

4. The statute involved is the Federal Tort Claims Act, particularly Section 1346(b), Title 28 U.S.C.

5. Petitioners now recite the facts of the case:

This was a suit brought as a civil action under Section 1346(b), Title 28, of U.S.C.A. The action arises out of the grounding of the Tug "NAVAJO", which was towing a barge designated as AS-16 carrying 1204.25 tons of triple super phosphate. The grounding occurred on Chandeleur Island on October 1, 1951. The petition alleges that the grounding was due solely to the failure of the light on

Chandeleur Island. The facts can best be stated by quoting paragraphs 7 and 8 of the petition.

> "VII. The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of 'aids to navigation', and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.
>
> "VIII. The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7, and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain the light or to notify vessels that the said light was not functioning."

Suit was originally brought in the Southern District of Mississippi but was transferred to the Eastern District of Louisiana, New Orleans Division. A motion to dismiss was then filed on the basis that the appellee, the

United States of America, had not consented to be sued under the Tort Claims Act for the type of maritime tort set forth in the petition; that, in the alternative, the provisions of the Suits in Admiralty Act, 46 U.S.C.A. or the Public Vessels Act, 46 U.S.C.A. 787, was applicable. The motion was maintained and the petition was dismissed and appellant appealed.

6. The basis for Federal jurisdiction in the Court of the first instance is the Federal Tort Claims Act and particularly Section 1346(b), Title 28 U.S.C.

ARGUMENT.

7. This petition presents to your Honors purely a question of law. Does the petitioner set forth such a claim for relief as comes under the Federal Tort Claims Act? Does petitioner set forth such a claim for relief that the decision in the *Dalehite* case should, as a mere matter of mechanics, decide the case against petitioners?

Petitioners further aver that there are many cases in the lower courts which sustain petitioners' petition prior to the *Dalehite* case. They are:

Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

Somerset Seafood Company vs. United States, 193 Fed. 2d 631, decided by the U. S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court.

Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court, decided by Judge Chestnut.

Lacy vs. United States, 98 Fed. Supp. 219.

State of Maryland, for the use of Pumphrey vs. Manor Real Estate and Trust Co., 176 Fed. 2d 414.

Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792.

Hernandez vs. United States, 112 Fed. Supp. 369.

Moran vs. United States, 102 Fed. Supp. 275.

The judges' opinion in these cases sustaining appellant's position are unanswerable.

Petitioners further aver that they are calling the Court's attention to these cases for the reason that they do not believe it was the intention of this Honorable Court to overrule these cases, and petitioners aver that these cases are still decisive of the case at bar, but petitioners now desire to show this Honorable Court that, instead of being authority for the decisions of the district court and the Court of Appeals in dismissing petitioners' claim, they are authority for denying the motion to dismiss.

Petitioners aver that a reading of the majority opinion rendered by the Honorable Mr. Justice Reed shows that the *Dalehite* case was decided upon one ground and one ground only; that all of the allegations in the plaintiff's petition in that case were based upon a **WRONGFUL** discretionary administrative action. He says:

> "It is not probable that the courts would extend Tort Claims Act into the realm of the validity of

legislation or discretionary administrative action, but H.R. 6463 makes this specific.

> "The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

Petitioners further aver that if the majority opinion of this Honorable Court is analyzed, the whole basis of the decision is to the effect that all allegations of liability were based upon abuse of discretion. For instance, Section 3 of the opinion says:

> "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed."

Again the Court says:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

The Court further said:

> "The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific

citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or by-laws. . .for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.' "

Petitioners finally quote from the last paragraph of the opinion which we think is decisive in this case:

"Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43-44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see e.g., the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 742-743, in regard to maintenance and cure. Street, Tort Liability of the State; the Federal Tort Claims Act and the Crown Proceedings Act, 47 Mich. L. Rev. 341, 360."

Petitioners aver that this was not the violation of a discretionary duty. The claim in this case specifically states a cause of action, because it alleges acts of negli-

gence and omissions on the part of a specific Coast Guard officer.

It does not fall within the exception of a discretionary duty. If the Coast Guard, in its discretion, had not placed a light on Chandeleur Island and the cause of action were based upon this failure to use the proper discretion, a cause of action might not have been stated. When the Coast Guard placed the light, it used its discretion. It said to mariners—a light is necessary here, and you may depend upon it. The cause of action alleged is negligence in the maintenance and operation of the light by a subordinate officer. It is not based upon the discretion of the Coast Guard in failing to maintain the light. The Coast Guard immediately placed the light in operation again. It is based solely upon an act of negligence on the part of a subordinate officer in the performance of his duties. It clearly does not come under the exception in Sub-section (A) of Article 2680, Title 28, U.S.C.A., wherein it says:

> "* * are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty * * *."

If the Coast Guard, in its discretion, determined that a light should be established and kept burning, and the light went out because of the negligence of a subordinate officer, then it is liable. It is clearly the intention of Congress that the negligence of any employee of the Coast Guard engaged in a civil function is the basis of a claim against the Government. Subsection (J) excludes "any claim arising out of the combatant activities of the

military naval force or the Coast Guard during time of war". This exclusion shows clearly, under every reasonable theory of interpretation, that it was the intention of Congress that the Coast Guard should be liable for the negligence of any employee engaged in a peace time activity.

Petitioners aver that Judge McLaughlin of the United States District Court of Hawaii, in the case of *Hernandez vs. United States, supra,* sums up the matter in a way which cannot be disputed. In this case the United States set up a road block at a point intersecting a roadway of Hickman Field, a United States military air field. The plaintiff was forced to run off the road to avoid hitting the road block. Suit was brought under the Federal Tort Claims Act, alleging negligence on the theory that there were not proper warning signals, sentries or guards or anything else to indicate danger or any notice to travelers or passers along the highway of the road block. The judge said in answer to the argument, that the erection of the road block was a *discretionary function.*

> "Applying the reasoning of the Somerset Seafood Co., Dishman and Costley cases, this Court concludes that exception (a) of Section 2680 is not applicable in this case. It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead. The allega-

tions in the complaint are sufficient to confer jurisdiction on this Court to adjudicate the claim.

"The motion to dismiss is denied."

Petitioners further aver that the following language of Judge Ridge in *Mid-Central Fish Co. vs. United States*, 112 Fed. Supp. 792, shows the correct distinction between the *Dalehite* case and the present case:

> "Although Congress has provided in Section 2674, Title 28, U. S. C. A. that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. Somerset Seafood Co. v. United States, 4 Cir., 193 F. 2d 631; Cerri v. United States, D. C., 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act.' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156, (and authorities cited therein)."

Petitioners further aver that this distinction has been recognized by the Court of Appeals for the State of New York and the Supreme Court for the State of Illinois, two courts which are recognized as being outstanding. These cases are: *Johnston vs. City of East Moline*, 405 Ill. 460, 91 N. E. 2nd 401 and *Foley vs. New York*, 294 N.Y. 275, 62 N.E. 2d. 69.

In the *Johnston* case the Court said:

> "We do not agree with that statement of law when applied to the facts now before us. By article 7 of the Vehicle and Traffic Law the Legislature created the State Traffic Commission and prescribed its functions. By section 95-a of that article it is provided that 'The state traffic commission shall have the power and *it shall be its duty* to regulate the type, location, erection, *maintenance* and removal of all traffic control signals and signal lights on or along any state highway maintained by the state, and *every such signal or light shall hereafter be maintained at the expense of the state.*' (Emphasis supplied.) The traffic control signal here involved was erected on Union Road, a 'state highway maintained by the state.' It also appears from unreversed findings by the Court of Claims—'That the maintenance of Union Road and the traffic lights on said road were taken over completely by the State of New York and maintained solely by the Department of Public Works Division of highway approximately four years prior to August 4, 1940, the date of the accident herein'; that 'it was the duty of the members of the Police Force of the Town of Amherst while daily touring the road and passing this traffic light to look at it and see if it was working right, and if it was not, to report it to the State Highway De-

partment.' If, as has been found by the Court of Claims and the Appellate Division, the State, at the time of the accident here involved, had failed properly to perform the statutory duty it had undertaken to maintain the lights in the traffic control signal on Union Road, we think such breach of duty is made actionable by the State's waiver of immunity from liability declared by section 8 of the Court of Claims Act: 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complied with the limitations of this article.'

"We have had occasion to say that 'By section 12-a (now §8 of the Court of Claims Act) liability when proved by the rules of law applicable to individuals has been affirmatively assumed (by the State) and jurisdiction to determine whether such a liability has been proved is conferred upon the Court of Claims.' (Jackson v. State of New York, 261 N.Y. 134, 138; see, also, Holmes v. County of Erie, 291 N.Y. 798; Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 353; Paige v. State of New York, 269 N.Y. 352, 356)." *Foley v. State of New York*, 294 N.Y. 279, 280, 62 N. E. 2d 69.

"There was no statute requiring appellant to construct and maintain automatic signal devices at the intersection in question. (Cahill Illinois Rev. Stat. 1927, chap. 95a, secs. 26 and 33, pars. 27 and 34; Ill. Rev. Stat. 1943, chap. 95½, sec. 30, par. 127.) Its action in this connection was voluntary. It had the power to provide for them if in its discretion they were necessary, but it was not required to do so. There is no claim that appellant was negligent in the

exercise of its discretion to provide such system, or in the original construction of it. Whether in those matters it was in the exercise of a governmental function or a corporate duty is not, therefore, before us. The question of what the city did or permitted at the intersection, in the matter of controlling or not controlling traffic after the northwest standard was removed, is before us, and whether or not its acts and omissions in that regard were in the exercise of a governmental function or a corporate duty must be decided.

"As early as *City of Chicago v. Powers*, 42 Ill. 169, the principle was recognized that where a municipality undertakes to protect a street or bridge by lights it is liable for negligence if it does it in an insufficient manner. In *City of Freeport v. Isbell*, 83 Ill. 440, the same principle is enunciated and the *Powers* case is cited, the court saying with reference to it: 'In the case referred to, the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished by the city was insufficient to afford proper protection.' In the *Isbell* case the city had omitted to light a portion of the street. It was held not liable but the court said: 'In this case, if the city of Freeport, under the power conferred by the charter, had assumed to light the street where the accident occurred, but had exercised the power in a negligent manner, and had failed, in the exercise of the power, to furnish lights sufficient to afford proper security from danger, a different rule would prevail, and the rule announced in the case cited (Powers case) would govern.'

"A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon

as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner. *Johnston v. City of Chicago*, 258 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 371; 4 Dillon on Mun. Corp. (5th ed.) sec. 1741.

"A rule determining when a municipality is exercising a public or governmental function as distinguished from a strictly corporate duty is difficult to formulate. It has been said more than once that all that can be done with safety is to determine each case as it arises. See *Johnston v. City of Chicago*, 258 Ill. 494, 497, wherein is cited *Lloyd v. New York*, 5 N.Y. 369, and *Cobb v. Dalton*, 53 Ga. 426. In the *Johnston* case the city was held liable for negligence of a driver of an automobile hired by the library board which was part of the city government and who at the time of the accident was conveying books from one library building to another along the streets of Chicago. On page 497 of that opinion, the court, speaking through Mr. Justice Carter, said: 'It is frequently stated that to determine whether there is municipal responsibility the inquiry must be whether the particular agents or servants for whose acts of negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law, or merely for the carrying out of private functions which are for its special benefit or advantage. (Citations).' In the same case it was said that the mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for torts committed by its employees." *Johnston v. City of East Moline*, 405 Ill. 465-466.

It is respectfully submitted that, therefore, the per curiam decision of the Court of Appeals for the Fifth Circuit is incorrect, and since both it and the District Court have based their decision squarely upon the decision in the *Dalehite* case, this Court should grant a writ of certiorari and determine whether or not this case has been and is decided by the case of *Dalehite, supra.*

8. Petitioners annexed hereto a copy of the judgment sought to be reviewed, as Appendix "B".

Wherefore, your petitioners pray that a writ of certiorari issue under the seal of this Honorable Court, directing the Court of Appeals for the Fifth Circuit and commanding that Court to certify and send to this Court for review a full and complete transcript of the record and all proceedings in that Court numbered and entitled on its docket, "*Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, United Firemen's Insurance Company, Appellants versus United States of America,* #14,747, and that the said opinion and decree of the Court of Appeals for the Fifth Circuit be reversed and rendered and that there be an order issued ordering that the motion of the United States of America to dismiss the above entitled and numbered cause be and is hereby dismissed.

Respectfully Submitted,

CICERO C. SESSIONS,

Attorney for Petitioners.

Of Counsel:

ARTHUR B. HAMMOND, JR.,
RICHARD B. MONTGOMERY, JR.,
1105 Maritime Building,
New Orleans, La.

Petitioners further aver that if the majority opinion of this Honorable Court is analyzed, the whole basis of the decision is to the effect that all allegations of liability were based upon abuse of discretion. For instance, Section 3 of the opinion says:

> "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed."

Again the Court says:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

The Court further said:

> "The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or by-laws. . .for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.'"

Petitioners finally quote from the last paragraph of the opinion which we think is decisive in this case:

> "Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is

covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, Committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43-44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see e.g., the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 742-743, in regard to maintenance and cure. Street, Tort Liability of the State; the Federal Tort Claims Act and the Crown Proceedings Act, 47 Mich. L. Rev. 341, 350."

Petitioners aver that this was not the violation of a discretionary duty. The claim in this case specifically states a cause of action, because it alleges acts of negligence and omissions on the part of a specific Coast Guard officer.

It does not fall within the exception of a discretionary duty. If the Coast Guard, in its discretion, had not placed a light on Chandeleur Island and the cause of action were based upon the failure to use the proper discretion, a cause of action might not have been stated. When the Coast Guard placed the light, it used its discretion. It said to mariners—a light is necessary here, and you may depend upon it. The cause of action alleged is negligence

APPENDIX "A".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 14747.

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana.

(April 22, 1954.)

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo", as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the Dalehite case while appellee as vigorously insists that that decision and the decision in the Feres case[1] are controlling here.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.

AFFIRMED.

---

[1] Feres v. United States, 340 U.S. 135.

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX "B".

Judgment.

Extract from the Minutes of April 22, 1954.

No. 14747.

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * * * * *

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
NOV 24 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. [illegible]

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

BRIEF ON BEHALF OF PETITIONERS
ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CICERO C. SESSIONS,
806 National Bank of Commerce Building, New Orleans, La.,
Attorney for Petitioner.

OF COUNSEL:
ARTHUR B. HAMMOND, JR.,
RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Building,
New Orleans 12, Louisiana.

SUBJECT INDEX

	PAGE
JURISDICTION OF THIS HONORABLE COURT	2
THE FACTS	2
THE QUESTION PRESENTED FOR REVIEW	4
ARGUMENT	4
APPENDIX "A"	17
APPENDIX "B"	19
APPENDIX "C"	20
Sec. 1346(b) Title 28 U.S.C.	3,17,20
Dalehite, Elizabeth H., et al. vs. United States of America, 73 Sup. Ct. 956, 346 U.S. 15	2, 4, 17
Foley vs. New York, 294 N.Y. 275, 62 N.E. 2d 69	10, 12
Hernandez vs. United States, 112 Fed. Supp. 369	4, 8
Johnston v. City of East Moline, 405 Ill. 460, 91 N.E. 2d 401	10, 14
Lacy vs. United States, 98 Fed. Supp. 219	4
Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792	4, 9
Moran vs. United States, 102 Fed. Supp. 275	4
Somerset Seafood Company vs. United States, 193 Fed. 2d 631, decided by U.S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court	4
Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court decided by Judge Chestnut	4
Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284	4

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 213

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The jurisdiction of Your Honors was invoked in this case because of a decision of the United States District Court for the Eastern District of Louisiana, New Orleans Division, entitled "Indian Towing Co., Inc. et al. vs. United States of America", No. 3667 C. A., and because of a per curiam decree of the United States Court of Appeals for the Fifth Circuit, No. 14,747, 211 Fed. Rep. 2d 866. Your Honors granted a petition for a writ of certiorari on October 14, 1954.

JURISDICTION OF THIS HONORABLE COURT.

The jurisdiction is based squarely upon a statute of the United States and the proper interpretation thereof. This is the Federal Tort Claims Act, Section 1346(b), Title 28, U.S.C. The jurisdiction of this Honorable Court is further predicated upon a decision of this Court, namely, *Elizabeth H. Dalehite, et al vs. United States of America*, 73 Sup. Ct. 956, 346 U.S. 15.

THE FACTS.

This was a suit brought as a civil action under Section 1346(b), Title 28, of U.S.C.A. The action arises out of the grounding of the Tug "NAVAJO" which was towing a barge designated as AS-16 carrying 1204.25 tons of triple super phosphate. The grounding occurred on Chandeleur Island on October 1, 1951. The petition alleges that the grounding was due solely to the failure of the light on Chandeleur Island. The facts can best be stated by quoting paragraphs 7 and 8 of the petition.

> "VII. The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation', and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered

upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

"VIII. The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7, and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain the light or to notify vessels that the said light was not functioning."

Suit was originally brought in the Southern District of Mississippi but was transferred to the Eastern District of Louisiana, New Orleans Division. A motion to dismiss was then filed on the basis that the United States of America, had not consented to be sued under the Tort Claims Act for the type of maritime tort set forth in the petition; that, in the alternative, the provisions of the Suits in Admiralty Act, 46 U.S.C.A. or the Public Vessels Act, 46 U.S.C.A. 787, were applicable. The motion was maintained and the petition was dismissed and appellant appealed.

The basis for Federal jurisdiction in the Court of the first instance is the Federal Tort Claims Act and particularly Section 1346(b), Title 28 U.S.C.

THE QUESTION PRESENTED FOR REVIEW

Your Honors are presented with purely a question of law. Was such a claim set forth for relief as comes under the Federal Tort Claims Act? Do petitioners set forth such a claim for relief that the decision in the *Dalehite* case should, as a mere matter of mechanics, decide the case against petitioners.

THE ARGUMENT

Petitioners further aver that there are many cases in the lower courts which sustain petitioners' petition prior to the *Dalehite* case. They are:

Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

Somerset Seafood Company vs. United States, 193 Fed. 2d 613, decided by the U. S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court.

Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court, decided by Judge Chestnut.

Lacy vs. United States, 98 Fed. Supp. 219.

State of Maryland, for the use of Pumphrey vs. Manor Real Estate and Trust Co. 176 Fed. 2d 414.

Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792.

Hernandez vs. United States, 112 Fed. Supp. 369.

Moran vs. United States, 102 Fed. Supp. 275.

The judges' opinion in these cases sustaining petitioners' postion are unanswerable.

Petitioners further aver that they are calling the Court's attention to these cases for the reason that they do not believe it was the intention of this Honorable Court to overrule these cases, and petitioners aver that these cases are still decisive of the case at bar, but petitioners now desire to show this Honorable Court that, instead of being authority for the decisions of the district court and the Court of Appeals in dismissing petitioners' claim, they are authority for denying the motion to dismiss.

Petitioners aver that a reading of the majority opinion rendered by the Honorable Mr. Justice Reed shows that the *Dalehite* case was decided upon one ground and one ground only; that all of the allegations in the plaintiff's petition in that case were based upon a wrongful **DISCRETIONARY ADMINISTRATIVE** action. He says:

> "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific.
>
> The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

in the maintenance and operation of the light by a subordinate officer. It is not based upon the discretion of the Coast Guard in failing to maintain the light. The Coast Guard immediately placed the light in operation again. It is based solely upon an act of negligence on the part of a subordinate officer in the performance of his duties. It clearly does not come under the exception in Sub-section (A) of Article 2680, Title 28, U.S.C.A., wherein it says:

> "* * are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty * * *."

If the Coast Guard, in its discretion, determined that a light should be established and kept burning, and the light went out because of the negligence of a subordinate officer, then it is liable. It is clearly the intention of Congress that the negligence of any employee of the Coast Guard engaged in a civil function is the basis of a claim against the Government. Subsection (J) excludes "any claim arising out of the combatant activities of the military naval force or the Coast Guard during time of war". This exclusion shows clearly, under every reasonable theory of interpretation, that it was the intention of Congress that the Coast Guard should be liable for the negligence of any employee engaged in a peace time activity.

Petitioners aver that Judge McLaughlin of the United States District Court of Hawaii, in the case of *Hernandez vs. United States, supra*, recognized this distinction. In this case the United States set up a road block at a point

intersecting a roadway of Hickman Field, a United States military air field. The plaintiff was forced to run off the road to avoid hitting the road block. Suit was brought under the Federal Tort Claims Act, alleging negligence on the theory that there were not proper warning signals, sentries or guards or anything else to indicate danger or any notice to travelers or passers along the highway of the road block. The judge said in answer to the argument, that the erection of the road block was a *discretionary function.*

> "Applying the reasoning of the Somerset Seafood Co., Dishman and Costley cases, this Court concludes that exception (a) of Section 2680 is not applicable in this case. It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead. The allegations in the complaint are sufficient to confer jurisdiction on this Court to adjudicate the claim.
>
> "The motion to dismiss is denied."

Petitioners further aver that the following language of Judge Ridge in *Mid-Central Fish Co. vs. United States*, 112 Fed. Supp. 792, shows the correct distinction between the *Dalehite* case and the present case.

> "Although Congress has provided in Section 2674, Title 28, U. S. C. A. that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is

not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. Federal Crop Ins. Corp. v. Merrill, 332 U. S. 380, 388, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. Somerset Seafood Co. v. United States, 4 Cir., 193 F. 2d 631; Cerri v. United States, D. C., 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act.' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156, (and authorities cited therein)."

Petitioners further aver that this distinction has been recognized by the Court of Appeals for the State of New York and the Supreme Court for the State of Illinois, two courts which are recognized as being outstanding. These cases are: *Johnston vs. City of East Moline*, 405 Ill. 460, 91 N. E. 2nd 401 and *Foley vs. New York*, 294 N. Y. 275, 62 N. E. 2d. 69.

In the *Johnson* case the Court said:

"We do not agree with that statement of law when applied to the facts now before us. By article 7 of

the Vehicle and Traffic Law the Legislature created the State Traffic Commission and prescribed its functions. By section 95-a of that article it is provided that 'The state traffic commission shall have the power and *it shall be its duty* to regulate the type, location, erection, *maintenance* and removal of all traffic control signals and signal lights on or along any state highway maintained by the state, and *every such signal or light shall hereafter* be *maintained at the expense of the state.*' (Emphasis supplied.) The traffic control signal here involved was erected on Union Road, a 'state highway maintained by the state.' It also appears from unreversed findings by the Court of Claims—'That the maintenance of Union Road and the traffic lights on said road were taken over completely by the State of New York and maintained solely by the Department of Public Works Division of highway approximately four years prior to August 4, 1940, the date of the accident herein'; that 'it was the duty of the members of the Police Force of the Town of Amherst while daily touring the road and passing this traffic light to look at it and see if it was working right, and if it was not, to report it to the State Highway Deparment.' If, as has been found by the Court of Claims and the Appellate Division, the State, at the time of the accident here involved, had failed properly to perform the statutory duty it had undertaken to maintain the lights in the traffic control signal on Union Road, we think such breach of duty is made actionable by the State's waiver of immunity from liability declared by section 8 of the Court of Claims Act: 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in

accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complied with the limitations of this article.'

"We have had occasion to say that 'By section 12-a (Now §8 of the Court of Claims Act) liability when proved by the rules of law applicable to individuals, has been affirmatively assumed (by the State) and jurisdiction to determine whether such a liability has been proved is conferred upon the Court of Claims.' (Jackson v. State of New York, 261 N.Y. 134, 138; see, also, Holmes v. County of Erie, 291 N.Y. 798; Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 353; Paige v. State of New York, 269 N.Y. 352, 356)." *Foley v. State of New York*, 294 N.Y. 279, 280, 62 N. E. 2d 69.

"There was no statute requiring appellant to construct and maintain automatic signal devices at the intersection in question. (Cahill Illinois Rev. Stat. 1927, chap. 95a, secs. 26 and 33, pars. 27 and 34; Ill. Rev. Stat. 1943, chap. 95½, sec. 30, par 127.) Its action in this connection was voluntary. It had the power to provide for them if in its discretion they were necessary, but it was not required to do so. There is no claim that appellant was negligent in the exercise of its discretion to provide such system, or in the original construction of it. Whether in those matters it was in the exercise of a governmental function or a corporate duty is not therefore, before us. The question of what the city did or permitted at the intersection, in the matter of controlling or not controlling traffic after the northwest standard was removed, is before us, and whether or not its acts and omissions in that regard were in the exer-

cise of a governmental function or a corporate duty must be decided.

"As early as *City of Chicago v. Powers*, 42 Ill. 169, the principle was recognized that where a municipality undertakes to protect a street or bridge by lights it is liable for negligence if it does it in an insufficient manner. In *City of Freeport v. Isbell*, 83 Ill. 440, the same principal is enunciated and the *Powers* case is cited, the court saying with reference to it: 'In the case referred to, the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished by the city was insufficient to afford proper protection.' In the *Isbell* case the city had omitted to light a portion of the street. It was held not liable but the court said: 'In this case, if the City of Freeport, under the power conferred by the charter, had assumed to light the street where the accident occurred, but had exercised the power in a negligent manner, and had failed; in the exercise of the power, to furnish lights sufficient to afford proper security from danger, a different rule would prevail, and the rule announced in the case cited (Powers case) would govern.'

"A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially, and is bound to see that the work is done in a reasonably safe and skillful manner. *Johnston v. City of Chicago*, 285 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 37; 4 Dillon on Mun. Corp. (5th ed.) sec. 1741.

"A rule determining when a municipality is exercising a public or governmental function as distinguished from a strictly corporate duty is difficult to formulate. It has been said more than once that all that can be done with safety is to determine each case as it arises. See *Johnston v. City of Chicago*, 258 Ill. 494, 497, wherein is cited *Lloyd v. New York*, 5 N.Y. 369, and *Cobb v. Dalton*, 53 Ga. 426. In the *Johnston* case the city was held liable for negligence of a driver of an automobile hired by the library board which was part of the city government and who at the time of the accident was conveying books from one library building to another along the streets of Chicago. On page 497 of that opinion, the court, speaking through Mr. Justice Carter, said: 'It is frequently stated that to determine whether there is municipal responsibility the inquiry must be whether the particular agents or servants for whose acts of negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law, or merely for the carrying out of private functions which are for its special benefit or advantage. (Citations).' In the same case it was said that the mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for torts committed by its employees." *Johnston v. City of East Moline*, 405 Ill. 465-466.

It is most respectfully submitted that the dissent of Chief Justice Massey of the Court of Civil Appeals of the State of Texas, in the case of *Parson vs. Texas City*, 259 S.W. 2d 333, expresses the modern philosophy as to the liability of a sovereign. It expresses the reasons why

Congress enacted the Federal Tort Clause Act as law. He said:

> "The question is one not heretofore passed upon in Texas, and the writer, cognizant of the fact that the modern tendency is to restrict rather than to extend the doctrine of municipal immunity, and subscribing to the principles thereof, believes that correct application of principles of law requires the extension of the corporate obligations of a municipality to this and future situations similarly arising... And this I especially believe should apply when by law of the state a traveler upon city streets is directed by such city's defective mechanical traffic signals into a position of great danger, when the city has had time, after notice of the defect, to correct the condition of hazard thereby created."

Justice Massey, in his dissent, quoted the case of *City of Galveston vs. Posnainsky*, 62 Texas 118, which was decided back in 1884, wherein the following charge to the jury was given:

> "The opening and repairing of streets is a matter of discretion in the city government; but when she undertakes to open or construct streets and travel ways, she must so construct them as to render their use reasonably safe to such persons as are naturally expected to use said ways, using such care as such persons ordinarily exercise."

WHEREFORE, it is respectfully submitted that the per curiam decision of the Court of Appeals for the Fifth Circuit is incorrect, and that it should, therefore, be reversed, and that the matter be remanded for further

hearing, and that the order of the United States District Court for the Eastern District, New Orleans Division, in the cause entitled, *"Indian Towing Company, et al. vs. United States of America"*, No. 3667 on the Civil Docket of that Court, be recalled, and that the case be ordered tried with instructions as to the rights of petitioners under the Federal Tort Claims Act, and particularly Section 1346(b), Title 28 U.S.C.

Respectfully submitted,

CICERO C. SESSIONS,
806 National Bank of Commerce Building, New Orleans 12, Louisiana.

Of Counsel:
ARTHUR B. HAMMOND, JR.,
RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Building,
New Orleans, Louisiana.

I certify that a copy of the foregoing brief has been served on the Solictor General and upon Paul A. Sweeney, Attorney, Department of Justice by depositing same in a United States Mail Box with air mail postage prepaid this date.

Nov. 1954.

CICERO C. SESSIONS.

APPENDIX "A".

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo", as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Slone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the *Dalehite* case while appellee as vigorously insists that that decision and the decision in the *Feres* case are controling here.

Feres v. United States, 340 U.S. 135.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.

AFFIRMED

A True copy:
Teste:

.....
Clerk of the United States Court of
Appeals for the Fifth Circuit.

APPENDIX "B".

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

APPENDIX "C".

Section 1346(b)—Title 28 U.S.C.

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

LIBRARY
SUPREME COURT, U.S.

Supreme Court of the United States

OCTOBER TERM, 1954.

No. 213

INDIAN TOWING COMPANY, INC., ET AL.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

REPLY BRIEF ON BEHALF OF THE PETITIONERS.

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans 12, Louisiana,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 213.

INDIAN TOWING COMPANY, INC., ET AL.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

REPLY BRIEF ON BEHALF OF THE PETITIONERS.

MAY IT PLEASE THE COURT:

This reply brief was written because of three very important cases recently decided which we now call to the attention of the court.

The first is *Bevilacqua vs. United States, Yentsch v. United States,* 122 F. Supp. 493, where the facts were as follows: The Federal Government erected a series of navigation locks along the Allegheny River. These locks were operated by the Corps of Engineers of the United States Army. Lock No. 8 was one of the series of locks erected by the Government in accordance with a uniform system in

effect at all the locks. Certain electric lights were maintained to warn navigators on the river of the peril to navigation created by the dam. The power generating equipment for the lights did not function during the hours between 11 P.M. and 7 A.M., and, therefore, during those hours navigators were warned of the peril to navigation by kerosene lanterns. It was the duty of some employee of the Government to light these lanterns each night at 11 P.M. At approximately 12:05 A.M. of July 15, 1951, Yentsch and Bevilacqua, libellants intestates, went over the dam at Lock No. 8 and met their death. Judge Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, found that, as a matter of fact, the kerosene lanterns at Lock No. 8 were not lit on the night in question, and that the failure to light them was the proximate cause of the death of Yentsch and Bevilacqua. Judge Gourley further stated:

> "It is neither necessary nor appropriate to inquire into whether the chief administrative officer of the Corps of Engineers might have decided, in an exercise of discretion, that the locks should be left in darkness when unattended. It is enough that superior officers have promulgated an unqualified rule to the effect that the lock should not be left in darkness. It is clear that the negligence herein charged was in no manner associated with an exercise of discretion. U. S. v. Hull, 1 Cir., 195 F.2d 64; Jackson v. U. S., 3 Cir., 196 F.2d 725; Costley v. U. S., 5 Cir., 181 F.2d 723."

The *Bevilacqua* case is exactly parallel with the one at hand. The lanterns were placed on the river as an aid to navigation, just as the lighthouse in our case was

placed near Chandeleur Island as an aid to navigation. The decision to place the lights in both instances had been made before any damage was done, and the subordinate charged with the duty of lighting and maintaining the lights, in each case, was without discretion—he simply had a duty to perform.

The second case we wish to call to the attention of the Court is *Pennsylvania R.R. Co. v. United States, et al.; A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, et al.*, and related cases, 124 F. Supp. 52. The *Pennsylvania Railroad Company* case is very similar to the case of *Dalehite vs. United States*, except that in the *Pennsylvania* case after the Coast Guard had used discretion in deciding that certain lighters could be loaded with high explosives, there were individual acts of negligence pleaded on the part of the Coast Guard Officer who was in charge of the operation. As a matter of fact, there were serious charges of negligence made against the Captain of the Port and his Chief Engineer as individuals after the decision to allow the loading had been made. The Court held that insofar as allowing the loading was concerned, this was an act of discretion, but as soon as it had been decided to allow the lighters to be loaded, the discretion ended, and that acts of negligence in loading made the United States liable under the Federal Tort Claims Act.

We also wish to call Your Honors' attention to the decision of *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*; Nos. 11,991 and 11,992, and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and

12,018, United States Court of Appeals for the District of Columbia Circuit, decided February 8, 1955. The statements of the Court to which we wish to call your particular attention are:

"The holding of the *Costley*, *Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite vs. United States*, 346 U.S. 15 (1953)."

* * * * * * * * *

"The Government says the *Somerset Seafood Company* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary."

* * * * * * * * *

"We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational level, where there is no 'room for policy judgment and decision'. This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.

"The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

> "To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.'

"We may paraphrase the quoted sentence thus:

> "'To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower.'

"Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United States would have been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

* * * * * * * *

"The three negligent omissions and the one affirmative negligent act found by the court were not 'decisions responsibly made at a planning level' and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680(a) and clearly described in the *Dalehite* decision."

Finally we call Your Honors' attention to *Martin vs. Bd. of Fire Com'rs. for City of New Orleans*, 132 La. 187, 61 So. 197 and *Barnes vs. District of Columbia*, 91 U.S. 440, 23 L.Ed. 440.

Respectfully submitted,

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans 12, Louisiana,
Attorney for Petitioners.

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel by depositing in the U. S. Mail on this, the .... day of February, 1955.

.....

Office Supreme Court, U. S.
FILED
MAY 5 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. 318

INDIAN TOWING COMPANY, INC., et al.,

Petitioners,

versus

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING.

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans, Louisiana,
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954.

No. 213.

INDIAN TOWING COMPANY, INC., et al.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

PETITION FOR REHEARING.

The petition of the INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA —FARM BUREAU SERVICE COMPANY and UNITED FIREMEN'S INSURANCE COMPANY, petitioning for a rehearing in the above matter as a result of the decree entered on Monday, April 11, 1955, under which the Court, by an equal division of the Honorable members, affirmed the decision of the Honorable Herbert W. Christenberry, Judge of the United States District Court for the Eastern District of Louisiana and the per curiam decision of the United States Court of Appeals for the Fifth Circuit, with respect avers:

1.

That both the Honorable Judge Christenberry and the Honorable Judges of the United States Court of Appeals

for the Fifth Circuit decided the matter in favor of the respondent and appellee solely upon the basis of this Honorable Court's decision in *Dalehite vs. United States of America*, 346 U. S. 15, 73 Sup. Ct. 956. They took the position that the matter was completely controlled by Your Honors' decision.

2.

Your Honors are divided in that case 4 to 3, with Justice Reed writing the opinion for the majority, and the late Justice Jackson writing the minority opinion. Your petitioners aver that when this matter was argued only seven justices were on the bench; that since the date of the argument Justice Harlan has been appointed and confirmed. Your petitioners aver that, under these circumstances, they are entitled to an argument before not seven justices but before a full court in a matter of such serious and grave import as this. They respectfully call the court's attention to a case decided by his Honor Justice Harlan against the government, *Panella vs. U. S.*, 216 Fed. 2nd 622.

3.

Petitioners further aver that they are entitled to a rehearing for the reason that there are serious cases which may be determined by this case. A decision as important as this to the litigants in *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*, Nos. 11,991 and 11,992 and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and 12,018, and *Pennsylvania R.R. Co. v. United*

States, et al., A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, and related cases, 124 F. Supp. 52, (D.C.N.J. 1954) should be decided by the whole court. Petitioners would most certainly be aggrieved in the event the Court should, with a full Court, find in favor of the Eastern Air Lines and the Pennsylvania Railroad and enunciate a doctrine contrary to the one now approved by a divided court in this case.

4.

Petitioners further aver that the decision as it now stands makes the per curiam decision of the United States Court of Appeals for the Fifth Circuit the deciding factor in determining rights under the act. Since the date of the argument on February 8, 1955, namely on March 2, 1955 the Fifth Circuit Court of Appeals decided the case of *U. S. vs. Lawter*, 219 Fed. 2d 559. It was too late to call this Honorable Court's attention to this case. The case was not reported until the Advance Sheets of April 11, 1955 which was the date the case at bar was decided.

It is submitted that the Fifth Circuit Court of Appeals in the *Lawter* case completely disavowed the *Indian Towing Company, et al. vs. United States* decision. The Court distinguishes the *Lawter* case from the *Indian Towing Company* case by saying this:

> "Whatever then might be said of the liability of the United States, if the case had to do *with mere negligent omission or inaction of the Coast Guard, as was the case in Indian Towing Co. U. S. 5 Cir. 211 F (2) 886, is not controlling here* * *". (Emphasis supplied.)

The *Lawter* case was an action against the Federal Government for negligence on the part of the U. S. Coast Guard in attempting a rescue by helicopter of four people whose boat capsized in Biscayne Bay, Florida and was decided in favor of the plaintiffs and against the United States.

We have but to call the Court's attention to the precise wording of the Statute (28 U.S.C. Sec. 1346 (b)) to see that the Congress intended no differentiation between affirmative and passive negligence:

> "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the United States * * * for injury or loss of property * * * caused by the negligent or wrongful act *or omission* of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act *or omission* occurred." (Emphasis supplied.)

Clearly then, if the alleged "*omission to act*" were the sole basis for this decision below, and this Court had been so informed when the review was perfected and argued, petitioners feel that a reversal might have been ordered. While the archaic doctrine of governmental immunity had always been complicated with distinctions between active and inactive negligence (most of which could never be rationalized), one of the clear cut areas of liability imposed by the Federal Tort Claims Act was the "*omission to act*" as well as the *active* perpetration of a tort. The two cases are indistinguishable.

The underlying reason for the Fifth Circuit deciding this case as it did—a simple per curiam affirmance of the District Court—would never have been known, had it not been referred to (with an explanation of its basis) in *U. S. vs. Lawter.*

WHEREFORE, petitioners respectfully submit that a rehearing should be granted in order that a reargument may be had.

Most Respectfully Submitted,

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans, Louisiana,
Attorney for Petitioners

CERTIFICATE.

This is to certify that copies of this brief have been served on opposing counsel by depositing in the U. S. Mail on this, the ..... day of April, 1955.

.....

Supreme Court, U. S.
FILED
SEP 22 1955
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

October Term, 1954

No. [redacted] 8

INDIAN TOWING COMPANY, INC., et al.,
Petitioners,

versus

THE UNITED STATES,
Respondent.

BRIEF ON REHEARING IN BEHALF OF INDIAN TOWING COMPANY, INC., ET AL.

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans, Louisiana,
Attorney for Petitioners.

SUBJECT INDEX

	PAGE
THE FACTS	3
THE QUESTION PRESENTED FOR REVIEW	5
THE ARGUMENT	6
APPENDIX "A"	26
APPENDIX "B"	28
APPENDIX "C"	29

CASES:

Barnes vs. District of Columbia, 91 U. S. 440, 23 L. Ed. 440 21

Bevilacqua vs. United States and Yentsch vs. United States, 122 F. Supp. 493 ..... 17, 18

City of Chicago vs. Powers, 42 Ill. 169 14

City of Chicago vs. Seben, 165 Ill. 371 15

City of Galveston vs. Posnainsky, 62 Tex. 18 17

Cobb vs. Dalton, 53 Ga. 426 15

Dalehite vs. United States, 346 U. S. 15 (1953) 6, 11, 20

Dalehite, Elizabeth H., et al. vs. United States of America, 73 Sup. Ct. 956, 346 U. S. 15 11

Eastern Air Lines, Inc. vs. Union Trust Company, et al. and United States of America vs. Union Trust Company, et al., 221 F. 2d 562 19

Foley vs. New York, 294 N.Y. 275, 62 N.E. 2d 69 ..... 12, 14

Hernandez vs. United States, 112 Fed. Supp. 369 ..... 6, 10

Johnston vs. City of Chicago, 258 Ill. 494 ..... 15, 16

Johnston vs. City of East Moline, 405 Ill. 460, 91 N.E. 2d 401 ..... 12, 15

CASES—(Continued)

	PAGE
Lacy vs. United States, 98 Fed. Supp. 249	6
Lloyd vs. New York, 5 N. Y. 369	15
Martin vs. Board of Fire Commissioners for the City of New Orleans, 132 La. 187, 61 So. 197	21
Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792	6, 11
Moran vs. United States, 102 Fed. Supp. 275	6
National City Bank of New York vs. Republic of China, et al., 75 Supp. Ct. 423	23
Parson vs. Texas City, 259 S.W. 2d 333	16
Pennsylvania R. R. Co. vs. United States, et al., A. & M. Trading Company, et al. vs. United States, Rinn vs. United States, Geary vs. United States, et al., 124 Fed. Supp. 52	19
Somerset Seafood Company vs. United States, 193 Fed. 2d 613	6
Somerset Seafood Company vs. United States, 98 Fed. Supp. 298	6
State of Maryland for the use of Pumphey vs. Manor Real Estate and Trust Co., 176 Fed. 2d 414	6
United States vs. Lawter, 219 Fed. 2d 559	22
Wickman vs. Inland Waterways Corp., 78 Fed. Supp. 284	6

SUPREME COURT OF THE UNITED STATES.

No. 213.

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY,

Appellants,

versus

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON REHEARING IN BEHALF OF INDIAN TOWING COMPANY, INC., ET AL.

MAY IT PLEASE THE COURT:

There have been no decisions bearing directly on the issues here involved since the filing of the application for a re-hearing in this matter. This brief is being filed merely to set forth a consolidated presentation for the convenience of the Court of all previous petitions and briefs filed in this case in behalf of petitioners.

The INDIAN TOWING COMPANY, INC., the UPPER MISSISSIPPI TOWING CORPORATION, the MINNESOTA FARM BUREAU SERVICE COMPANY, and UNITED FIREMEN'S INSURANCE COMPANY peti-

tioned this Honorable Court for a writ of certiorari to review a final decree of the United States Court of Appeals for the Fifth Circuit, No. 14,747, in which the said Court of Appeals affirmed a decree of the United States District Court for the Eastern District of Louisiana. This per curiam decree was rendered by Hutcheson, Chief Judge, Holmes and Borah.

The opinion delivered by the Court below is reported in 211 Fed. Rep. 2d 886, and a copy of said opinion is annexed hereto, as Appendix "A".

The judgment of the lower court was rendered on April 22, 1954. The time of its entry is unknown to petitioners. A statement of the grounds on which the jurisdiction of this Court was invoked is as follows:

a. The per curiam decree was rendered solely on the basis that the matter before the Court had been decided by Your Honors, the Supreme Court of the United States, on the authority *Elizabeth H. Dalehite, Henry G. Dalehite, Jr., et al. vs. United States of America*, 73 Sup. 956, 346 U. S. 15.

b. Petitioners aver that the case presented to the United States District Court and to the United States Court of Appeals for the Fifth Circuit does not come under the authority of *Dalehite vs. United States (supra)*, and that the only recourse that petitioners had was an application for writ of certiorari to this Honorable Court.

c. Petitioners aver that both the Judge of the United States District Court and the Judges of the United States Court of Appeals decided the case

solely on the basis of the decision of this Honorable Court and on no other basis. Petitioners will show that the facts of the case at bar are entirely different from the facts of the *Dalehite* case, and that both courts were in error in deciding the case at bar solely upon the basis of Your Honors' decision.

d. Petitioners show that, if your Honors' decision in the *Dalehite* case is applicable to the case at bar, then Your Honors have completely rewritten the Federal Tort Claims Act, so as to make it inapplicable to any tort claims against the United States of America other than damages due to automobile accidents.

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by writ of certiorari is 28 U.S.C. 1254.

The question presented for review is whether the United States is liable under the Federal Tort Claims Act, Section 1346(b), Title 28 U.S.C., for damage to cargo resulting when a tug towing a barge was grounded on an island due to the negligence of the Coast Guard.

THE FACTS.

This was a suit brought as a civil action under Section 1346(b), Title 28, of U.S.C.A. The action arises out of the grounding of the Tug "NAVAJO" which was towing a barge designated as AS-16 carrying 1204.25 tons of triple super phosphate. The grounding occurred on Chandeleur

Island on October 1, 1951. The petition alleges that the grounding was due solely to the failure of the light on Chandeleur Island. The facts can best be stated by quoting paragraphs 7 and 8 of the petition.

"VII. The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of 'aids to navigation', and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

"VIII. The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7, and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain the light or to notify vessels that the said light was not functioning."

Suit was originally brought in the Southern District of Mississippi but was transferred to the Eastern District of Louisiana, New Orleans Division. A motion to dismiss was then filed on the basis that the United States of America, had not consented to be sued under the Tort Claims Act for the type of maritime tort set forth in the petition; that, in the alternative, the provisions of the Suits in Admiralty Act, 46 U.S.C.A. or the Public Vessels Act, 46 U.S.C.A. 787, were applicable. The motion was maintained and the petition was dismissed and appellant appealed.

The basis for Federal jurisdiction in the Court of the first instance is the Federal Tort Claims Act and particularly Section 1346(b), Title 28 U.S.C.

THE QUESTION PRESENTED FOR REVIEW.

Your Honors are presented with purely a question of law. Was such a claim set forth for relief as comes under the Federal Tort Claims Act? Do petitioners set forth such a claim for relief that the decision in the *Dalehite* case should, as a mere matter of mechanics, decide the case against petitioners.

THE ARGUMENT.

Petitioners aver that there are many cases in the lower courts which sustain petitioners' petition prior to the *Dalehite* case. They are:

Wickman vs. Inland Waterways Corporation, 78 Fed. Supp. 284.

Somerset Seafood Company vs. United States, 193 Fed. 2d 613, decided by the U. S. Court of Appeals for the Fourth Circuit, Judge Dobie as the organ of the Court.

Somerset Seafood Company vs. United States, 98 Fed. Supp. 298, in the lower court, decided by Judge Chesnut.

Lacy vs. United States, 98 Fed. Supp. 219.

State of Maryland, for the use of Pumphrey vs. Manor Real Estate and Trust Co., 176 Fed. 2d 414.

Mid-Central Fish Co. vs. United States, 112 Fed. Supp. 792.

Hernandez vs. United States, 112 Fed. Supp. 369.

Moran vs. United States, 102 Fed. Supp. 275.

The judges' opinion in these cases sustaining petitioners' position are unanswerable.

Petitioners further aver that they are calling the Court's attention to these cases for the reason that they do not believe it was the intention of this Honorable Court to overrule these cases, and petitioners aver that these cases are still decisive of the case at bar, but petitioners now desire to show this Honorable Court that, instead of being authority for the decisions of the district court and the

Court of Appeals in dismissing petitioners' claim, they are authority for denying the motion to dismiss.

Petitioners aver that a reading of the majority opinion rendered by the Honorable Mr. Justice Reed shows that the *Dalehite* case was decided upon one ground and one ground only; that all of the allegations in the plaintiff's petition in that case were based upon a wrongful **DISCRETIONARY ADMINISTRATIVE** action. He says:

> "It is not probable that the courts would extend a Tort Claims Act into the realm of the validity of legislation or discretionary administrative action, but H.R. 6463 makes this specific.
>
> "The legislative history indicates that while Congress desired to waive the Government's immunity from actions for injuries to person and property occasioned by the tortious conduct of its agents acting within their scope of business, it was not contemplated that the Government should be subject to liability arising from acts of a governmental nature or function."

Petitioners further aver that if the majority opinion of this Honorable Court is analyzed, the whole basis of the decision is to the effect that all allegations of liability were based upon abuse of discretion. For instance, Section 3 of the opinion says:

> "That the cabinet-level decision to institute the fertilizer export program was a discretionary act is not seriously disputed."

Again the Court says:

> "In short, the alleged 'negligence' does not subject the Government to liability. The decisions held culpable were all responsibly made at a planning rather than operational level and involved considerations more or less important to the practicability of the Government's fertilizer program."

The Court further said:

> "The District Court's holding that the Coast Guard and other agencies were negligent in failing to prevent the fire by regulating storage or loading of the fertilizer in some different fashion is like his specific citations of negligence discussed above. They are classically within the exception. 'The power to adopt regulations or by-laws. . . for the preservation of the public health, or to pass ordinances prescribing and regulating the duties of policemen and firemen * * * are generally regarded as discretionary, because, in their nature, they are legislative.'"

Petitioners finally quote from the last paragraph of the opinion which we think is decisive in this case:

> "Petitioners rely on the word 'wrongful' though as showing that something in addition to negligence is covered. This argument, as we have pointed out, does not override the fact that the Act does require some brand of misfeasance or nonfeasance, and so could not extend to liability without fault; in addition, the legislative history of the word indicates clearly that it was not added to the jurisdictional grant with any overtones of the absolute liability theory. Rather, committee discussion indicates that it had a much narrower inspiration: 'trespasses' which might not be

considered strictly negligent. Hearings before a Subcommittee of the Senate Committee on the Judiciary on S. 2690, 76th Cong., 3d Sess. 43-44. Had an absolute liability theory been intended to have been injected into the Act, much more suitable models could have been found, see e.g., the Suits in Admiralty Act, 41 Stat. 525, 46 U.S.C. § 742-743, in regard to maintenance and cure. Street, Tort Liability of the State; the Federal Tort Claims Act and the Crown Proceedings Act, 47 Mich. L. Rev. 341, 350."

Petitioners aver that this was not the violation of a discretionary duty. The claim in this case specifically states a cause of action, because it alleges acts of negligence and omissions on the part of a specific Coast Guard officer.

It does not fall within the exception of a discretionary duty. If the Coast Guard, in its discretion, had not placed a light on Chandeleur Island and the cause of action were based upon the failure to use the proper discretion, a cause of action might not have been stated. When the Coast Guard placed the light, it used its discretion. It said to mariners—a light is necessary here, and you may depend upon it. The cause of action alleged is negligence in the maintenance and operation of the light by a subordinate officer. It is not based upon an indiscretion of the Coast Guard in deciding not to maintain the light because the Coast Guard immediately placed it in operation again. It is based solely upon an act of negligence on the part of a subordinate officer in the performance of his duties. It clearly does not come under the exception in

Sub-section (A) of Article 2680, Title 28, U.S.C.A., wherein it says:

> "* * are based upon the exercise or performance, or the failure to exercise or perform, a discretionary function or duty * * *."

If the Coast Guard, in its discretion, determined that a light should be established and kept burning, and the light went out because of the negligence of a subordinate officer, then it is liable. It is clearly the intention of Congress that the negligence of any employee of the Coast Guard engaged in a civil function is the basis of a claim against the Government. Subsection (J) excludes "any claim arising out of the combatant activities of the military naval force or the Coast Guard during time of war". This exclusion shows clearly, under every reasonable theory of interpretation, that it was the intention of Congress that the Coast Guard should be liable for the negligence of any employee engaged in a peace time activity.

Petitioners aver that Judge McLaughlin of the United States District Court of Hawaii, in the case of *Hernandez vs. United States, supra*, recognized this distinction. In this case the United States set up a road block at a point intersecting a roadway of Hickman Field, a United States military air field. The plaintiff was forced to run off the road to avoid hitting the road block. Suit was brought under the Federal Tort Claims Act, alleging negligence on the theory that there were not proper warning signals, sentries or guards or anything else to indicate danger or give notice to travelers or passers along the highway of

the road block. The judge said in answer to the argument, that the erection of the road block was a *discretionary function*.

> "Applying the reasoning of the Somerset Seafood Co., Dishman and Costley cases, this Court concludes that exception (a) of Section 2680 is not applicable in this case. It may be assumed arguendo that the erection of a road block is a discretionary function. However, after having exercised its discretion to erect the road block, the Government had the absolute duty to properly and adequately warn passers along the road of the hazard created. There is certainly no discretion not to warn the foreseeable motoring public of the danger ahead. The allegations in the complaint are sufficient to confer jurisdiction on this Court to adjudicate the claim.
>
> "The motion to dismiss is denied."

Petitioners contend that the following language of Judge Ridge in *Mid-Central Fish Co. vs. United States*, 112 Fed. Supp. 792, shows the correct distinction between the *Dalehite* case and the present case:

> "Although Congress has provided in Section 2674, Title 28, U. S. C. A. that the United States shall be liable 'in the same manner and to the same extent as a private individual under like circumstances,' it is not thereby meant that federal liability is conditioned upon private liability under identical factual circumstances. Governmental liability may be imposed under the Act, even though private liability could never arise under identical factual situations due to the fact that the tortious discharge of purely sovereign, as distinguished from proprietary, functions is involved. Cf. Federal Crop Ins. Corp. v. Merrill, 332

U. S. 380, 383, 68 S. Ct. 1, 92 L. Ed. 10. The distinction which is to be drawn between legal and factual circumstances existing between the Government and its agents and those existing between the Government and third parties, constitutes the very foundation for the principle that no distinction is to be drawn between sovereign and proprietary functions of Government for purposes of ascertaining governmental liability under the Federal Tort Claims Act. Somerset Seafood Co. v. United States, 4 Cir., 193 F. 2d 631; Cerri v. United States, D. C., 80 F. Supp. 831; also, 'Problems under the Federal Tort Claims Act.' by L. R. Yankwich, United States District Judge for the Southern District of California, 9 F. R. D. 143, 156, (and authorities cited therein)."

Petitioners further aver that this distinction has been recognized by the Court of Appeals for the State of New York and the Supreme Court for the State of Illinois, two courts which are recognized as being outstanding. These cases are: *Johnston vs. City of East Moline*, 405 Ill. 460, 91 N. E. 2nd 401 and *Foley vs. New York*, 294 N. Y. 275, 62 N. E. 2d, 69.

In the *Johnston* case the Court said:

"We do not agree with that statement of law when applied to the facts now before us. By article 7 of the Vehicle and Traffic Law the Legislature created the State Traffic Commission and prescribed its functions. By section 95-a of that article it is provided that 'The state traffic commission shall have the power and *it shall be its duty* to regulate the type, location, erection, *maintenance* and removal of all traffic control signals and signal lights on or

along any state highway maintained by the state, and *every such signal or light shall hereafter* be *maintained at the expense of the state.*' (Emphasis supplied.) The traffic control signal here involved was erected on Union Road, a 'state highway maintained by the state.' It also appears from unreversed findings by the Court of Claims—'That the maintenance of Union Road and the traffic lights on said road were taken over completely by the State of New York and maintained solely by the Department of Public Works Division of highway approximately four years prior to August 4, 1940, the date of the accident, herein'; that 'it was the duty of the members of the Police Force of the Town of Amherst while daily touring the road and passing this traffic light to look at it and see if it was working right, and if it was not, to report it to the State Highway Department.' If, as has been found by the Court of Claims and the Appellate Division, the State, at the time of the accident here involved, had failed properly to perform the statutory duty it had undertaken to maintain the lights in the traffic control signal on Union Road, we think such breach of duty is made actionable by the State's waiver of immunity from liability declared by section 8 of the Court of Claims Act: 'The state hereby waives its immunity from liability and action and hereby assumes liability and consents to have the same determined in accordance with the same rules of law as applied to actions in the supreme court against individuals or corporations, provided the claimant complied with the limitations of this article.'

"We have had occasion to say that 'By section 12-a (Now §8 of the Court of Claims Act) liability when proved by the rules of law applicable to individuals,

has been affirmatively assumed (by the State) and jurisdiction to determine whether such a liability has been proved is conferred upon the Court of Claims." (Jackson v. State of New York, 261 N.Y. 134, 138; see, also, Holmes v. County of Erie, 291 N.Y. 798; Bloom v. Jewish Board of Guardians, 286 N.Y. 349, 353; Paige v. State of New York, 269 N.Y. 352, 356)." *Foley v. State of New York*, 294 N.Y. 279, 280, 62 N. E. 2d 69.

"There was no statute requiring appellant to construct and maintain automatic signal devices at the intersection in question. (Cahill Illinois Rev. Stat. 1927, chap. 95a, secs. 26 and 33; pars. 27 and 34; Ill. Rev. Stat. 1943, chap. 95½, sec. 30, par 127.) Its action in this connection was voluntary. It had the power to provide for them if in its discretion they were necessary, but it was not required to do so. There is no claim that appellant was negligent in the exercise of its discretion to provide such system, or in the original construction of it. Whether in those matters it was in the exercise of a governmental function or a corporate duty is not, therefore, before us. The question of what the city did or permitted at the intersection, in the matter of controlling or not controlling traffic after the northwest standard was removed, is before us, and whether or not its acts and omissions in that regard were in the exercise of a governmental function or a corporate duty must be decided.

"As early as *City of Chicago v. Powers*, 42 Ill. 169, the principle was recognized that where a municipality undertakes to protect a street or bridge by lights it is liable for negligence if it does it in an insufficient manner. In *City of Freeport v. Isbell*, 83 Ill. 440, the same principle is enunciated and the

Powers case is cited, the court saying with reference to it: 'In the case referred to, the city had lighted a certain bridge where the accident occurred, as well as the street; but the injury arose from the fact that the light furnished by the city was insufficient to afford proper protection.' In the *Isbell* case the city had omitted to light a portion of the street. It was held not liable but the court said: 'In this case, if the City of Freeport, under the power conferred by the charter, had, assumed to light the street where the accident occurred; but had exercised the power in a negligent manner, and had failed, in the exercise of the power, to furnish lights sufficient to afford proper security from danger, a different rule would prevail, and the rule announced in the case cited (Powers case) would govern.'

"A municipal corporation acts judicially or exercises discretion when it selects and adopts a plan in the making of public improvements, but as soon as it begins to carry out that plan it acts ministerially and is bound to see that the work is done in a reasonably safe and skillful manner. *Johnston v. City of Chicago*, 258 Ill. 494; *City of Chicago v. Seben*, 165 Ill. 371; 4 Dillon on Mun. Corp. (5th ed.) sec. 1741.

"A rule determining when a municipality is exercising a public or governmental function as distinguished from a strictly corporate duty is difficult to formulate. It has been said more than once that all that can be done with safety is to determine each case as it arises. See *Johnston v. City of Chicago*, 258 Ill. 494, 497, wherein is cited *Lloyd v. New York*, 5 N.Y. 369, and *Cobb v. Dalton*, 53 Ga. 426. In the *Johnston* case the city was held liable for negligence of a driver of an automobile hired by the library

board which was part of the city government and who at the time of the accident was conveying books from one library building to another along the streets of Chicago. On page 497 of that opinion, the court, speaking through Mr. Justice Carter, said: 'It is frequently stated that to determine whether there is municipal responsibility the inquiry must be whether the particular agents or servants for whose acts of negligence it is sought to hold the corporation are its agents and servants for the performance of a public duty imposed by law, or merely for the carrying out of private functions which are for its special benefit or advantage, (Citations).' In the same case it was said that the mere fact that a particular work may incidentally benefit the public does not necessarily exempt the city from liability for torts committed by its employees." *Johnston v. City of East Moline*, 405 Ill. 465-466.

It is most respectfully submitted that the dissent of Chief Justice Massey of the Court of Civil Appeals of the State of Texas, in the case of *Parson vs. Texas City*, 259 S.W. 2d 333, expresses the modern philosophy as to the liability of a sovereign. It expresses the reasons why Congress enacted the Federal Tort Claims Act as law. He said:

"The question is one not heretofore passed upon in Texas, and the writer, cognizant of the fact that the modern tendency is to restrict rather than to extend the doctrine of municipal immunity, and subscribing to the principles thereof, believes that correct application of principles of law requires the extension of the corporate obligations of a municipality to this and future situations similarly arising. . . And this I

> especially believe should apply when by law of the state a traveler upon city streets is directed by such city's defective mechanical traffic signals into a position of great danger, when the city has had time, after notice of the defect, to correct the condition of hazard thereby created."

Justice Massey, in his dissent, quoted the case of *City of Galveston vs. Posnainsky*, 62 Texas 118, which was decided back in 1884, wherein the following charge to the jury was given:

> "The opening and repairing of streets is a matter of discretion in the city government; but when she undertakes to open or construct streets and travel ways, she must so construct them as to render their use reasonably safe to such persons as are naturally expected to use said ways, using such care as such persons ordinarily exercise."

After the argument of the case three very important cases were called to the attention of the Court by petitioners in their reply brief.

The first was *Bevilacqua vs. United States, Yentsch v. United States*, 122 F. Supp. 493, where the facts were as follows: The Federal Government erected a series of navigation locks along the Allegheny River. These locks were operated by the Corps of Engineers of the United States Army. Lock No. 8 was one of a series of locks erected by the Government in accordance with a uniform system in effect at all the locks. Certain electric lights were maintained to warn navigators on the river of the peril to navigation created by the dam. The power generating equip-

ment for the lights did not function during the hours between 11 P.M. and 7 A.M., and, therefore, during those hours navigators were warned of the peril to navigation by kerosene lanterns. It was the duty of some employee of the Government to light these lanterns each night at 11 P.M. At approximately 12:05 A.M. of July 15, 1951, Yentsch and Bevilacqua, libellants intestates, went over the dam at Lock No. 8 and met their death. Judge Gourley, Chief Judge of the United States District Court for the Western District of Pennsylvania, found that, as a matter of fact, the kerosene lanterns at Lock No. 8 were not lit on the night in question, and that the failure to light them was the proximate cause of the death of Yentsch and Bevilacqua. Judge Gourley further stated:

> "It is neither necessary nor appropriate to inquire into whether the chief administrative officer of the Corps of Engineers might have decided, in an exercise of discretion that the locks should be left in darkness when unattended. It is enough that superior officers have promulgated an unqualified rule to the effect that the lock should not be left in darkness. It is clear that the negligence herein charged was in no manner associated with an exercise of discretion. U. S. v. Hull, 1 Cir., 195 F.2d 64; Jackson v. U. S., 3 Cir., 196 F.2d 725; Costley v. U. S., 5 Cir., 181 F.2d 723."

The *Bevilacqua* case is exactly parallel with the one at hand. The lanterns were placed on the river as an aid to navigation, just as the lighthouse in our case was placed near Chandeleur Island as an aid to navigation. The decision to place the lights in both instances had been made before any damage was done, and the

subordinate charged with the duty of lighting and maintaining the lights, in each case, was without discretion—he simply had a duty to perform.

The second case called to the attention of the Court was *Pennsylvania R.R. Co. v. United States, et al.; A. & M. Trading Corp., et al. vs. United States; Rinn vs. United States; Geary v. United States, et al.*, and related cases, 124 F. Supp. 52. The *Pennsylvania Railroad Company* case is very similar to the case of *Dalehite vs. United States*, except that in the *Pennsylvania* case after the Coast Guard had used discretion in deciding that certain lighters could be loaded with high explosives, there were individual acts of negligence pleaded on the part of the Coast Guard Officer who was in charge of the operation. As a matter of fact, there were serious charges of negligence made against the Captain of the Port and his Chief Engineer as individuals after the decision to allow the loading had been made. The Court held that insofar as allowing the loading was concerned, this was an act of discretion, but as soon as it had been decided to allow the lighters to be loaded, the discretion ended, and that acts of negligence in loading made the United States liable under the Federal Tort Claims Act.

We also wish to call Your Honors' attention to the decision of *Eastern Air Lines, Inc. vs. Union Trust Company, et al.*, Nos. 11,991 and 11,992, and *United States of America vs. Union Trust Company, et al.*, Nos. 12,017 and 12,018, 221 F.2d 562, United States Court of Appeals for the District of Columbia Circuit, decided February 8, 1955. The statements of the Court to which we wish to call your particular attention are:

"The holding of the *Costley, Somerset* and *Gray* cases was neither overruled nor impaired by the later decision of the Supreme Court in *Dalehite vs. United States*, 346 U.S. 15 (1953)."

. . . . . .

"The Government says the *Somerset Seafood Company* case was overruled by the *Dalehite* opinion. We think not; our analysis of that opinion convinces us to the contrary."

. . . . . .

"We may fairly infer from the statement just quoted that the United States is liable for the negligence of its employees at the operational level, where there is no 'room for policy judgment and decision'. This leads us to the Government's argument that the negligence charged against the tower operators is the same as that charged against the Coast Guard in the *Dalehite* case, which the Supreme Court held was not actionable because of the discretionary exception. We quote in the margin the Supreme Court's disposition of the alleged negligence of the Coast Guard.

"The Court made it clear that, as far as the alleged official dereliction of duty in failing to police the shipboard loading was concerned, the decision not to do so had been made at a policy-forming level and was not the decision of the individual members of the Coast Guard whose duty it would have been to do the policing had they been instructed to do it. The Court said:

"'. . . To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to im-

pose a quarantine for, let us say, an outbreak of foot-and-mouth disease.'

"We may paraphrase the quoted sentence thus:

" 'To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for the failure of the CAA to take over for maintenance and operation a certain air traffic control tower.'

"Had the Coast Guard authorities decided to supervise the storage, we have no doubt the United States would have been liable in tort for any causal negligence of its personnel acting at the operational level. So it is here: discretion was exercised when it was decided to operate the tower, but the tower personnel had no discretion to operate it negligently."

* * * * * * * * *

"The three negligent omissions and the one affirmative negligent act found by the court were not 'decisions responsibly made at a planning level' and did not involve any consideration important to the practicability of the Government's program of controlling air traffic at public airports. The tower operators acted, and failed to act, at an operational level. While they were in a sense exercising discretion as to what they should and should not do, they were not performing the sort of discretionary functions contemplated by § 2680(a) and clearly described in the *Dalehite* decision."

Additionally, your Honors' attention was directed to *Martin vs. Board of Fire Commissioners for the City of New Orleans*, 132 La. 187, 61 So. 197 and *Barnes vs. District of Columbia*, 91 U. S. 440, 23 L. Ed. 440.

A decree was entered on Monday, April 11, 1952, under which the Court, by an equal division of the honorable members, affirmed the decision of the lower court. As a result of that judgment petitioners applied for a re-hearing, which application was granted. In that petition the courts attention was specifically called to the case of *U. S. vs. Lawter*, 219 Fed. 2nd 559.

It is submitted that the Fifth Circuit Court of Appeals in the *Lawter* case completely disavowed the *Indian Towing Company, et al. vs. United States* decision. The Court distinguishes the *Lawter* case from the *Indian Towing Company* case by saying this:

> "Whatever then might be said of the liability of the United States, if the case had to do *with mere negligent omission or inaction of the Coast Guard, as was the case in Indian Towing Co. U. S. 5 Cir. 211 F (2) 886, is not controlling here* * *". (Emphasis supplied.)

The *Lawter* case was an action against the Federal Government for negligence on the part of the U. S. Coast Guard in attempting a rescue by helicopter of four people whose boat capsized in Biscayne Bay, Florida and was decided in favor of the plaintiffs and against the United States.

We have but to call the Court's attention to the precise wording of the Statute (28 U.S.C. Sec. 1346 (b)) to see that the Congress intended no differentiation between affirmative and passive negligence:

> "* * * the district courts * * * shall have exclusive jurisdiction of civil actions on claims against the

> United States * * * for injury or loss of property * * * caused by the negligent or wrongful act *or omission* of any employee of the Government * * * under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act *or omission* occurred." (Emphasis supplied.)

While the archaic doctrine of governmental immunity had always been complicated with distinctions between active and inactive negligence (most of which could never be rationalized), one of the clear cut areas of liability imposed by the Federal Tort Claims Act was the *"omission to act"* as well as the *active* perpetration of a tort. The two cases are indistinguishable.

As we said at the outset of this consolidated presentation, there have been no new cases bearing directly on the case at bar, but we would like to quote the following excerpt from the opinion of this Honorable Court in the *National City Bank of New York vs. Republic of China, et al.*, 75 S. Ct. 423.

> "But even the immunity enjoyed by the United States as territorial sovereign is a legal doctrine which has not been favored by the test of time. It has increasingly been found to be in conflict with the growing subjection of governmental action to the moral judgment. A reflection of this steady shift in attitude toward the American sovereign's immunity is found in such observations in unanimous opinions of this Court as 'Public opinion as to the peculiar rights and preferences due to the sovereign has

changed', Davis v. Pringle, 268 U.S. 315, 318, 45 S. Ct. 549, 550, 69 L. Ed. 974; 'There is no doubt an intermittent tendency on the part of governments to be a little less grasping than they have been in the past * * *,' White v. Mechanics' Securities Corp., 269 U. S. 283, 301, 46 S. Ct. 116, 118, 70 L. Ed. 275; '* * * the present climate of opinion * * * has brought governmental immunity from suit into disfavor * * *,' Keifer & Keifer v. Reconstruction Finance Corporation, 306 U. S. 381, 391, 59 S. Ct. 516, 519, 83 L. Ed. 784. This chilly feeling against sovereign immunity began to reflect itself in federal legislation in 1797. At that early day Congress decided that when the United States sues an individual, the individual can set off all debts properly due him from the sovereign. And because of the objections to *ad hoc* legislative allowance of private claims, Congress a hundred years ago created the Court of Claims, where the United States, like any other obligor, may affirmatively be held to its undertakings. This amenability to suit has become a commonplace in regard to the various agencies which carry out 'the enlarged scope of government in ecomonic affairs', Keifer & Keifer v. Reconstruction Finance Corp., supra, 306 U. S. at page 390, 59 S. Ct. at page 519. The substantive sweep of amenability to judicial process has likewise grown apace."

WHEREFORE, it is respectfully submitted that the decision of this Honorable Court affirming the Court of Appeal for the Fifth Circuit is incorrect, and that it should, therefore, be reversed and this matter should be remanded for further hearing; that the order of the United States District Court for the Eastern District of Louisiana, New

Orleans Division, in the cause entitled "*Indian Towing Company, et al. vs. United States of America,*" No. 3667 on the Civil Docket of that Court be recalled and that the case be ordered tried with instructions as to the rights of petitioners under the Federal Tort Claims Act and particularly 1346(b), Title 28, U.S.C.

Respectfully submitted,

RICHARD B. MONTGOMERY, JR.,
806 National Bank of Commerce Bldg.,
New Orleans, Louisiana,
Attorney for Petitioners.

I certify that a copy of the foregoing brief has been served on the solicitor general and on Paul A. Sweeney, Attorney, Department of Justice, by depositing same in a U. S. mail box with air mail postage prepaid this date.

September ..., 1955.

RICHARD B. MONTGOMERY, JR.

APPENDIX "A".

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo", as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U.S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the *Dalehite* case while appellee as vigorously insists that that decision and the decision in the *Feres* case[1] are controling here.

---

[1] Feres v. United States, 340 U.S. 135.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act, laid down in those cases, the judgment must be affirmed.

AFFIRMED.

A True copy:
Teste:

.....
Clerk of the United States Court of Appeals for the Fifth Circuit.

APPENDIX "B"

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

* * * * * * * *

APPENDIX "C".

Section 1346(b)—Title 28 U.S.C.

"Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

LIBRARY
SUPREME COURT, U.S.

No. 8

Office - Supreme Court, U. S.
FILED
AUG 9 1954
HAROLD B. WILLEY, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1954

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
PAUL A. SWEENEY,
Attorney,
Department of Justice,
Washington 25, D. C.

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	3
Argument	6
Conclusion	14

CITATIONS

Cases:

Auslander v. *St. Louis*, 332 Mo. 145	11
Avey v. *West Palm Beach*, 152 Fla. 717	11
Baker v. *Waco*, 129 S.W. 2d 469	11
Cerri v. *United States*, 80 F. Supp. 831	13
Dalehite v. *United States*, 346 U.S. 15	6-8, 12
Dorminey v. *Montgomery*, 232 Ala. 47	11
Feres v. *United States*, 340 U. S. 135	6-8
Foley v. *New York*, 294 N. Y. 275	11, 12
Hernandez v. *United States*, 112 F. Supp. 369	12
Johnston v. *City of East Moline*, 405 Ill. 460	11
Kirk v. *City of Muskogee*, 183 Okla. 536	11
Lacoji v. *United States*, 98 F. Supp. 219	12
Martin v. *Canton*, 41 Ohio App. 420	11
Mid-Central Fish Co. v. *United States*, 112 F. Supp. 792	12
Moran v. *United States*, 102 F. Supp. 275	12
National Manufacturing Co. v. *United States*, 210 F. 2d 263, certiorari denied, 347 U.S. 967	13
Sandmann v. *Sheehan*, 279 Ky. 614	11
Somerset Seafood Co. v. *United States*, 193 F. 2d 631	11, 12, 13
State of Maryland, for Use of Pumphrey v. *Manor Real Estate and Trust Co.*, 176 F. 2d 414	13
Texas City Disaster Litigation, In re, 197 F. 2d 771	13
Vickers v. *Camden*, 122 N. J. L. 14	11

Cases—Continued

	Page
Wickman v. *Inland Waterways Corp.*, 78 F. Supp. 284	12

Statutes:

Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946), 60 Stat. 842, 28 U.S.C. 921 *et seq.*, as reenacted 62 Stat. 869, 992:

28 U.S.C. 1291	2
28 U.S.C. 1346	2
28 U.S.C. 1346(b)	2
28 U.S.C. 1402	2
28 U.S.C. 1504	2
28 U.S.C. 2110	2
28 U.S.C. 2401	2
28 U.S.C. 2402	2
28 U.S.C. 2411	2
28 U.S.C. 2412	2
28 U.S.C. 2671-2680	2
28 U.S.C. 2674	3
14 U.S.C. 81	3, 9
14 U.S.C. 83	10
14 U.S.C. 84	10
14 U.S.C. 92	10
33 U.S.C. 409	11

Miscellaneous:

33 C.F.R. (1949 ed.):	
Section 64.01-1	11
Sections 66.01-1—66.01-35	10
Section 66.01-50	10
Section 68.01-1	11
Section 70.01-1	10
United States Coast Guard, *Aids to Navigation* (C. G. 127, 1945), p. 1201	10
United States Coast Guard, *Aids to Navigation Operated and Maintained by the United States Coast Guard* (June 30, 1953), p. 1	9, 10
United States Coast Guard, *Light List, Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), p. 5, 498	5

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 213

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the District Court was entered without an opinion. The *per curiam* opinion of the Court of Appeals is reported at 211 F. 2d 886.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1954. The petition for a writ of certiorari was filed on July 15, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a claim may be maintained against the United States under the Federal Tort Claims Act for damages resulting from the failure of a navigational light to operate, the failure allegedly resulting from the neglect of Coast Guard personnel properly to inspect and service the light.

STATUTES INVOLVED

1. The relevant provisions of the Federal Tort Claims Act [1] are as follows:

28 U.S.C. 1346(b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting

[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U.S.C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U.S.C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671-2680 effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * *

28 U.S.C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

2. 14 U.S.C. 81 provides:

Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the National Military Establishment; and

(3) Loran stations (a) required to serve

the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of Civil Aeronautics.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948.

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for property loss alleged to sustained as a result of negligence on the part of Coast Guard personnel in the maintenance of a lighthouse on Chandeleur Island, Louisiana.

The complaint (R. 2-6) alleged that petitioner Indian Towing Company is the owner of the tug *Navajo*. On October 1, 1951, while towing the barge *AS 16*, which had been chartered by petitioner Upper Mississippi Towing Corporation, the *Navajo* went aground on Chandeleur Island. The grounding allegedly was due solely to the failure of

the light on Chandeleur Island to function on that date, which failure, in turn, was due to the negligence of officers and enlisted personnel of the Coast Guard (R. 4-5). This alleged negligence consisted principally of (1) the inadequate examination of the light by one Chief Petty Officer Stone on his inspection trip of September 7, 1951, and (2) the failure of the Coast Guard to inspect the light between September 7, 1951 and October 1, 1951, in order to determine whether it was operating properly.[2] As a result of the grounding, sea water entered the cargo space of the barge *AS 16* which held 1,204.25 tons of triple superphosphate consigned to petitioner Minnesota Farm Bureau Service Company, and insured under a policy issued by petitioner United Fireman's Insurance Company. The phosphate was completely wetted and allegedly was damaged in the amount of $62,659.70.

The complaint was filed in the United States District Court for the Southern District of Mississippi on August 8, 1952 (R. 2). On motion of the United States (R. 5-6), the cause was transferred on September 15, 1952 to the Eastern District of Louisiana, the district in which the alleged negligence

[2] The Chandeleur Island lighthouse was "an unwatched light," i.e., no Coast Guard personnel were assigned to man it. It was described as such in the Light List outstanding on October 1, 1951. See United States Coast Guard, *Light List, Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 3, 493. This publication also advised mariners that, while they have a high degree of reliability, unwatched lights "may become irregular, or extinguished." *Id.*, p. 5.

took place and the district in which one of the petitioners (Indian Towing Company) resided. (R. 7-8.)

The United States, on December 1, 1952, moved to dismiss the complaint (R. 8-9). On June 29, 1953, the District Court dismissed the complaint, relying on *Dalehite* v. *United States*, 346 U.S. 15 (R. 11). On appeal, the Court of Appeals affirmed in a *per curiam* opinion, citing *Dalehite* v. *United States*, 346 U. S. 15, and *Feres* v. *United States*, 340 U. S. 135.

ARGUMENT

I. Petitioners contend that the court below misinterpreted the opinion of this Court in *Dalehite* v. *United States*, 346 U. S. 15, in holding that a claim based upon the failure of a navigational light to function did not come within the scope of the Federal Tort Claims Act. We submit, however, that the court below correctly applied the holdings of this Court in the *Dalehite* case, 346 U. S. at 43, and in *Feres* v. *United States*, 340 U. S. 135, 142, to the effect that the "Act did not create new causes of action where none existed before" and that it did not "visit the Government with novel and unprecedented liabilities."

In that part of the *Dalehite* opinion which considered whether the Federal Tort Claims Act had conferred jurisdiction upon district courts to enter judgments against the United States for negligent acts of the personnel of the Coast Guard, the Court stated (346 U. S. at 43-44):

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

"* * * the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres v. United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U.S.C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which de-

nied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon*, 295 N.Y. 51, 64 N.E. 2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.[3]

There is no question that the maintenance of aids to maritime navigation is peculiarly a governmental function with no private counterparts. In

[3] While the dissenting justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the Coast Guard aspect of the case. All had joined in the opinion in the *Feres* case on which the majority relied in holding that the Coast Guard was immune from liability under the Tort Claims Act (346 U.S. at 43-44); indeed, the *Feres* opinion was written by Mr. Justice Jackson, the author of the dissent in *Dalehite*. Instead, the dissenting justices found the circumstances surrounding the manufacture and shipment of the FGAN to afford a basis for imposing liability. And in doing so, they laid emphasis on the fact that activity of this nature has a private counterpart. "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. * * * The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper." (346 U.S. at 60.)

maintaining the lighthouse on Chandeleur Island and approximately thirty-eight thousand other federally-established aids, the Coast Guard performs the general public duty outlined in 14 U.S.C. 81, *supra*, pp. 3-4, which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions, and wrecks of vessels, * * * the Coast Guard *may* establish, maintain, and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States" (emphasis added). And these Coast Guard aids, which range from lightships on the one hand to unlighted buoys on the other, represent the overwhelming majority of the aids which are to be found on the navigable waters of the United States, its territories and possessions. Moreover, the Coast Guard has an absolute monopoly as to some types of aids. For example, it operates all of the 398 light stations (*i.e.*, a lighted aid on a fixed structure to which personnel are assigned for the purpose of watching the light).[4]

In addition to the maintenance of more than 90% of all navigational aids on the navigable waters of the United States, the Coast Guard exercises direct and close supervision over the roughly 3,300 so-called "private" aids to navigation. These private aids are erected and serviced by municipal, state, or federal agencies, or by private industry, but only after the approval of the Coast Guard has been

[4] U.S. Coast Guard, *Aids to Navigation Operated and Maintained by the United States Coast Guard* (June 30, 1953), p. 1.

obtained.[5] They generally take the form of unlighted buoys, day beacons, or lights upon fixed structures such as bridges,[6] and their construction is sanctioned where it has been administratively determined (1) that the aid is to be used exclusively by the agency or private person and will not serve general navigation, the interest which the Coast Guard is charged to protect,[7] *or* (2) if the aid is to

---

[5] Congress has made it a criminal offense for any "person, or public body, or instrumentality, excluding the armed services," to "establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations". (14 U.S.C. 83). Pursuant to this Section, and 14 U.S.C. 92, which confers upon the Secretary of the Treasury broad powers in regard to carrying out the functions delegated to the Coast Guard, regulations have been promulgated governing the establishment and maintenance of private aids. These regulations cover such matters as the application procedure, the required characteristics of the private aid, inspection by the Coast Guard, and the circumstances in which a private aid must be removed. See 33 C.F.R. (1949 ed.) §§ 66.01-1—66.01-35. Private aids lawfully maintained receive the same protection against interference or obstruction as is afforded by law to Coast Guard aids to navigation. See 14 U.S.C. 84; 33 C.F.R. (1949 ed.) §§ 66.01-50, 70.01-1.

[6] Of the 3301 private aids in operation on June 30, 1953, 3073 fell into one of these categories. The balance were lighted buoys, fog signals, and shore-based radar stations. *Op. cit. supra*, fn. 4, at p. 4. There are no statistics available which reflect the proportion of the private aids which are maintained by governmental units as opposed to individuals or corporations.

[7] The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids. [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945), p. 1201]:

> (1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.
>
> (2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which

be placed on a fixed structure, that the owner of the structure is legally obligated to do so."

We submit, therefore, that the instant case conforms in all respects with the rationale of the *Dalehite* and *Feres* cases. The activity whose misfunctioning gave rise to the claim was a purely governmental undertaking having no private counterpart.[9] There was no parallel liability existing be-

channels are used exclusively by the corporation's, or its contractor's, vessels.

(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

[8] Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C.F.R. (1949 ed.) § 68.01-1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U.S.C. 409; 33 C.F.R. (1949 ed.) 64.01-1. Cf. *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4).

[9] Because municipalities and states do not maintain navigational aids for the public benefit, as they do police and fire departments and militias, there never has been the opportunity to assert private actionable rights of the precise kind that appellants claim here. But even if appellants are to be allowed to draw on the closest municipal analogy to the lighthouse and buoy—namely the traffic light and stop sign—their position is not improved. For it is almost universally accepted that a municipality is not liable for the negligent maintenance of traffic-control devices. *See e.g. Dorminey* v. *Montgomery*, 232 Ala. 47; *Avey* v. *West Palm Beach*, 152 Fla. 717; *Sandmann* v. *Sheehan*, 279 Ky. 614; *Auslander* v. *St. Louis*, 332 Mo. 145; *Vickers* v. *Camden*, 122 N.J.L. 14; *Kirk* v. *City of Muskogee*, 183 Okla. 536; *Martin* v. *Canton*, 41 Ohio App. 420; *Baker* v. *Waco*, 129 S.W. 2d 493 (Tex. Civ. App.). The only cases *contra* which we have been able to find are *Johnston* v. *City of East Moline*, 405 Ill. 460, and *Foley* v. *New York*, 294 N.Y. 275. In *Johnston*, the court held that the operation of traffic signals is not a governmental function. And in the

fore the passage of the Act and to hold the Act applicable here would visit the United States with novel and unprecedented liabilities.

2. Petitioners also urge (Pet., pp. 5-6) that there are a number of cases in lower federal courts which sustain their view and contend that it is unreasonable to assume that this Court disapproved those cases in the *Dalehite* case without specifically mentioning them. Of these cases, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C.A. 4) and *Mid-Central Fish Co.* v. *United States*, 112 F. Supp. 792 (W.D. Mo.) are the only cases which deal specifically with the point here involved.[9] The problem was necessarily before this Court in *Dalehite* because the Court of Appeals for the Fifth

---

Foley case, liability was imposed upon the state for the negligent maintenance of a traffic signal on the ground that the New York vehicle and traffic law imposed a mandatory duty to maintain the signal. That no such mandatory duty has been imposed upon the Coast Guard in regard to navigational aids is clear. *Supra*, p. 9.

[9] *Wickman* v. *Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn.), dealt with the proposition that the Federal Tort Claims Act provided an exclusive remedy for allegedly tortious acts of employees of the Inland Waterways Corporation. *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.), held that the United States was not liable under the Federal Tort Claims Act for the failure of the Coast Guard to effectuate a rescue. *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate and Trust Company*, 176 F. 2d 414 (C.A. 4), held that a real estate board there involved was an agent or an employee of the United States and not an independent contractor. *Hernandez* v. *United States*, 112 F. Supp. 369 (D. Hawaii), dealt with the question of discretionary function, and *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.), held that a suit could be maintained under the Federal Tort Claims Act for death on the high seas.

Circuit in *In re Texas City Disaster Litigation*, 197 F. 2d 771, 780, had held that the United States was not liable for negligence of the Coast Guard. That part of the *Somerset Seafood* opinion which dealt with the question here involved and which relied upon *Cerri* v. *United States*, 80 F. Supp. 831 (N.D. Cal.), was expressly urged upon this Court in the *Dalehite* case by petitioner Pan-American Refining Corporation, et al. (Br., pp. 232-237). The problem was discussed by the Government in its brief in the *Dalehite* case, pp. 171-184; 203-212. We have assumed that, in agreeing with the decision below and with the Government's contention in this aspect of the case (see *supra*, pp. 6-8), this Court disapproved those parts of the *Somerset Seafood* and the *Cerri* opinions which held that the Tort Claims Act embraced claims for the non-functioning of a purely governmental activity. The *Mid-Central Fish Company* case, in so far as it relied upon the reasoning of the *Somerset Seafood* case and the *Cerri* case, is inconsistent with the *Feres* and *Dalehite* cases and was rejected by the Court of Appeals for the Eighth Circuit in *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 277-278, certiorari denied, 347 U. S. 967.

If we are wrong in our impression, and those parts of the *Somerset Seafood* and *Cerri* cases relied upon by petitioner (and other claimants) still retain precedential value, and this Court believes that the question is still open or requires further consideration, then we do not oppose the granting

of the writ in this case, for the question is of great importance and the position taken in this brief is consistently being urged by the Government upon lower federal courts as having the approval of this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision below is correct and that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
PAUL A. SWEENEY,
Attorney.

AUGUST, 1954.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
DEC 27 1954
HAROLD B. WILLEY, Clerk

No. [redacted]8

In the Supreme Court of the United States

OCTOBER TERM, 19[redacted]

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
PAUL A. SWEENEY,
CHARLES K. RICE,
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	5
Summary of Argument	7
Argument	10
I. Aids to marine navigation are maintained and controlled by the Coast Guard as part of its governmental responsibility	11
II. Claims against the United States based upon the performance of a governmental function without private counterpart, such as the maintenance by the Coast Guard of a navigational light, are excluded from the coverage of the Tort Claims Act	16
A. The Act covers only "private" torts	17
1. The limiting provisions of the Act	17
2. The decisions under the Act	27
B. There is no analogous private liability in like circumstances	38
1. States and municipalities are not liable for the negligent performance of comparable activities	40
2. If a duty at all, the obligation to maintain a lighthouse is owed to the public and a breach does not create private rights	52
Conclusion	58

CITATIONS

Cases:

Addington v. *Town of Littleton*, 50 Colo. 623	43
Amberg v. *Kinley*, 214 N. Y. 531	52

Cases—Continued

	Page
Annala v. *McLeod*, 122 Mont. 498	44, 54
Auslander v. *St. Louis*, 332 Mo. 145	47
Avey v. *West Palm Beach*, 152 Fla. 717	47
Baker v. *Waco*, 129 S. W. 2d 499	48
Barrett v. *State of New York*, 220 N. Y. 423	26, 40, 47
Blackburn v. *City of St. Louis*, 343 Mo. 301	46
Borough of Norristown v. *Fitzpatrick*, 94 Pa. 121	44
Bradley v. *Oskaloosa*, 193 Iowa 1072	45
Brogan v. *Philadelphia*, 346 Pa. 208	44
Cerri v. *United States*, 80 F. Supp. 831	36, 37
Chournos v. *United States*, 193 F. 2d 321, certiorari denied, 343 U. S. 977	30
City of Denver v. *Forster*, 89 Colo. 246	46
City of Knoxville v. *Hargis*, 18 Tenn. 262	43
City of Mansfield v. *Bristor*, 76 Ohio St. 270	43
City of New Orleans v. *Abbagnato*, 62 Fed. 240	44
Clain v. *City of Burlington*, 202 F. 2d 532	46
Clark v. *United States*, 109 F. Supp. 213	55
Coates v. *United States*, 181 F. 2d 816	26
Corruthers v. *City of St. Louis*, 341 Mo. 1073	43
Curran v. *Chicago Gt. Western Ry. Co.*, 134 Minn. 392	43
Dalehite v. *United States*, 346 U. S. 15 affirming 197 F. 2d 771	6, 9, 17, 18, 19, 20, 21, 22, 23, 25, 26, 27–33, 35, 36, 37, 42, 48, 51, 52, 55, 57, 58.
Dorminey v. *Montgomery*, 232 Ala. 47	47, 48–49
Doughty v. *Phila. Rapid Transit Co.*, 321 Pa. 136	45
Edwards v. *City of Shreveport*, 66 So. 2d 373	47
Everly v. *City of Gas*, 95 Kans. 305	43
Federal Crop Ins. Corp. v. *Merrill*, 332 U. S. 380	37
Feres v. *United States*, 340 U. S. 135	6, 7, 17, 21, 24, 25, 32, 33–34, 36, 37, 39, 56, 57
Ferrier v. *City of White Plains*, 262 App. Div. 94, leave to appeal denied, 287 N. Y. 852	46, 47
Finfera v. *Thomas*, 119 F. 2d 28	58
Fisher v. *City of Boston*, 104 Mass. 87	44
Foley v. *New York*, 294 N. Y. 275	48
German Alliance Ins. Co. v. *Home Water Co.*, 226 U. S. 220	49, 53
Gianfortone v. *City of New Orleans*, 61 Fed. 64	44

Cases—Continued

	Page
Gilbert v. *Corporation of Trinity House*, 17 Q. B. D. 795 (1886)	41
Giordano v. *City of Asbury Park*, 94 F. 2d 455, certiorari denied, 302 U. S. 745	44
Glanzer v. *Shepard*, 233 N. Y. 236	56
Goldstein v. *State of New York*, 281 N. Y. 396	40, 47
Gutowski v. *Mayor, etc., of City of Baltimore*, 127 Md. 502	42
Harman v. *City of St. Louis*, 137 Mo. 494	43
Harris v. *United States*, 205 F. 2d 765	30
Hayes v. *Michigan Central R. R. Co.*, 111 U. S. 228	53
Hernandez v. *United States*, 112 F. Supp. 369	35
Hines v. *City of Charlotte*, 72 Mich. 278	43
Hodges v. *City of Charlotte*, 214 N. C. 737	47
James v. *City of Harrodsburg*, 85 Ky. 191	43
Johnston v. *City of East Moline*, 405 Ill. 460	48
Johnston v. *District of Columbia*, 118 U. S. 19	26
Jones v. *City of Williamsburg*, 97 Va. 722	45
Jones v. *United States*, 207 F. 2d 563, certiorari denied, 347 U. S. 921	37
Kebert v. *Board of Wilson County Com'rs*, 134 Kans. 401	43
Kelley v. *City of Milwaukee*, 18 Wis. 83	43
King v. *United States*, 178 F. 2d 320, certiorari denied, 339 U. S. 964	20
Kirk v. *City of Muskogee*, 183 Okla. 536	46, 47
Kistner v. *Indianapolis*, 100 Ind. 210	43, 45
Kreichmar v. *City of Atchison*, 133 Kans. 198	43
Lacey v. *United States*, 98 F. Supp. 219	35, 55
Louisiana v. *McAdoo*, 234 U. S. 627	26
McCarthy v. *Munising*, 136 Mich. 622	45
McGuinness v. *Allison Realty Co.*, 46 Misc. 8, affirmed, 111 App. Div. 926	43
Marth v. *City of Kingfisher*, 22 Okla. 602	43
Martin v. *Canton*, 41 Ohio App. 420	48
Matreychuk v. *United States*, 195 F. 2d 613, certiorari denied, 344 U. S. 845	30
Mayne v. *Curtis*, 73 Ind. App. 640	43
Meadows v. *Village of Mineola*, 190 Misc. 815, 72 N. Y. S. 2d 368	44, 54

Cases—Continued

	Page
Means v. *Barnesville*, 28 Ga. App. 671	45
Mid-Central Fish Co. v. *United States*, 112 F. Supp. 792	35, 37
Millett v. *City of Princeton*, 167 Ind. 582	45
Moch Co. v. *Rensselaer Water Co.*, 247 N. Y. 160	53, 56
Moran v. *United States*, 102 F. Supp. 275	35
Murrain v. *Wilson Line*, 270 App. Div. 372, affirmed, 296 N. Y. 845	40, 44, 54
National Mfg. Co. v. *United States*, 210 F. 2d 263, certiorari denied, 347 U. S. 967	34, 37, 55, 57
Newiadony v. *State*, 276 App. Div. 59, (93 N. Y. S. 2d 24)	40
N. O. & N. E. R. Co. v. *Jopes*, 142 U. S. 18	54
Nez Perce Tribe of Indians, The v. *United States*, 95 C. Cls. 1, certiorari denied, 316 U. S. 686	44
O'Rourke v. *Sioux Falls*, 4 S. D. 47	44
P. Dougherty Co., The v. *United States*, 207 F. 2d 626, certiorari denied, 347 U. S. 912	34, 55
Paige v. *State of New York*, 269 N. Y. 352	40
Powell v. *Nashville*, 167 Tenn. 334	46
Prewitt v. *City of St. Joseph*, 334 Mo. 1228	46
Remy v. *City of Shenandoah*, 184 Iowa 1370	43
Rhodes v. *Kansas*, 167 Kan. 719	44
Roberson v. *District of Columbia*, 86 A. 2d 536	45
Rogers v. *City of Binghamton*, 101 App. Div. 352, affirmed, 186 N. Y. 595	45
Rose v. *City of Gypsum*, 104 Kan. 412	45
Routh v. *Quinn*, 20 Cal. 2d 488	50
Rusk v. *Montgomery*, 80 Ore. 93	43
Ryan v. *Kansas City*, 232 Mo. 471	43
Salmon v. *Kansas City*, 241 Mo. 14	43
Sandmann v. *Sheehan*, 279 Ky. 614	47
Savage v. *District of Columbia*, 52 A. 2d 120	44
Schmidt v. *United States*, 198 F. 2d 32, certiorari denied, 344 U. S. 896	30
Schuster v. *City of New York*, 121 N. Y. S. 2d 735	44
Sheppard v. *Glossop Corporation*, [1921] 3 K. B. 132	41, 46
Signor v. *United States*, 110 F. Supp. 906	34
Smart v. *United States*, 207 F. 2d 841	30

Cases—Continued

	Page
Smith v. *Selinsgrove Borough*, 199 Pa. 615	43
Somerset Seafood Co. v. *United States*, 193 F. 2d 631	35, 36, 37
South v. *State of Maryland*, 18 How. 396	44, 54
Spalding v. *Vilas*, 161 U. S. 483	26
State v. *General Stevedoring Co.*, 213 Fed. 51, affirmed, 219 Fed. 827	43
State of Maryland, for Use of Pumphrey v. *Manor Real Estate & Trust Co.*, 176 F. 2d 414	35
Steitz v. *City of Beacon*, 295 N. Y. 51	26, 40, 44, 48, 50, 53, 54
Tarbutton v. *Town of Tennille*, 110 Ga. 90	45
Taylor v. *Lake Shore & Mich. S. Ry.*, 45 Mich. 74	53
Texas and Pac. R. Co. v. *Rigsby*, 241 U. S. 33	52
Tolliver v. *Newark*, 145 Ohio St. 517	46
Town of Gainesboro v. *Gore*, 131 Tenn. 35	43
Trower v. *City of Louisiana*, 198 Mo. App. 352	44
Turner v. *United States*, 248 U. S. 354	24, 44, 53, 55
Ultramares Corp. v. *Touche*, 255 N. Y. 170	56
United States v. *Brown*, Oct. T. 1954, No. 38 (Dec. 6, 1954)	9, 25
United States v. *Gilman*, 347 U. S. 507	25, 51
United States v. *Price*, 95 F. 2d 687, certiorari denied, 305 U. S. 601	44, 54
United States v. *Spekar*, 338 U. S. 217	19
Veraguth v. *City of Denver*, 19 Colo. App. 473	43
Vickers v. *Camden*, 122 N. J. L. 14	47
Weightman v. *Corporation of Washington*, 1 Black 39	42
White v. *Casper*, 35 Wyo. 371	45
Wickman v. *Inland Waterways Corp.*, 78 F. Supp. 284	35
Wolff v. *District of Columbia*, 196 U. S. 152	46
Wynkoop v. *Mayor and City Council*, 159 Md. 194	44
Young v. *State of New York*, 278 App. Div. 997, affirmed 304 N. Y. 677	44, 50
Zywicki v. *Jos. R. Foard Co.*, 206 Fed. 975	42

Statutes:

	Page
Act of August 7, 1789, 1 Stat. 53	11
Act of May 15, 1820, 3 Stat. 598	12, 56
Act of June 23, 1874, 18 Stat. 204, 220	56
Act of June 20, 1906, 34 Stat. 321	14
Act of February 14, 1908, c. 552, Section 4, 32 Stat. 825, 826	12
Federal Tort Claims Act (Title IV of the Legislative Reorganization Act of 1946) 60 Stat. 842 as reenacted, 62 Stat. 869, 992,	18, 19
28 U. S. C. 1346 (b)	2, 8, 16, 20, 24, 39
28 U. S. C. 2674	3, 8, 9, 16, 20, 23, 24, 26, 30, 38, 39
28 U. S. C. 2680	3, 8, 9, 18
28 U. S. C. 2680 (a)	16, 20, 21, 23, 25, 26, 27, 40, 47, 51
Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 781 *et seq*	55
14 U. S. C. 81	3, 13, 39, 48
14 U. S. C. 83	14
14 U. S. C. 84	14
14 U. S. C. 86	37
14 U. S. C. 92	14
33 U. S. C. 409	15, 37
49 U. S. C. 401 *et seq*	27
New York Laws:	
1929, ch. 467	47
1939, ch. 860, Sec. 8	47
Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104):	
Section 387	41
Section 417	41
Section 420	41
Merchant Shipping Act, 1894 (57 & 58 Vic. c. 60):	
Section 634	41
Section 635	41
Section 636	41
Section 638	41
Section 643	41
Section 648	41
Section 676 (1) (i)	41

Statutes—Continued

	Page
Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44):	
Section 1	41
Section 5 (1)	41
Miscellaneous:	
37 Am. Jur. pp. 727–730	38
38 Am. Jur. pp. 261 *et seq*	38
33 C. F. R. (1949 ed.):	
Section 64.01–1	15
Section 66.01–1—66.01–35	14
Section 66.01–50	14
Section 68.01–1	15
Section 70.01–1	14
67 Cong. Rec.:	
Pages 11086–11100	19
Page 11092	19
Page 11100	19
69 Cong. Rec.:	
Page 2191	19
Page 2192	19
Page 2196	19
Page 3117	19
Page 3118	19
Page 3127	19
86 Cong. Rec., pp. 12021–12022	19
Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17	19
Hearings before Subcommittee No. 1 of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess., on H. R. 7236:	
Page 15	17–18
Page 16	19
Page 22	17–18
Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690:	
Pages 27–28	19
Page 34	17, 24
Page 37	24

Miscellaneous—Continued

Page

Hearings before a Subcommittee of the Committee on Judiciary—Continued
Page 38 ... 17
Page 39 ... 17
Page 51 ... 24
Pages 52–53 ... 17
Hearings before the Commiftee on the Judiciary, H. of Reps., 77th Cong., 2d Sess., on H: R. 5373 and H. R. 6463:
Page 28 ... 19
Page 29 ... 23
Page 33 ... 20
Page 35 ... 23
Page 37 ... 19
Page 38 ... 19, 20
Page 39 ... 20
Page 45 ... 20
Page 65 ... 20
Page 66 ... 19, 20
H. R. 7236, 76th Cong ... 19, 24
H. R. 5299, Sec. 201, 77th Cong. 1st Sess ... 23
H. Rept. No. 2800, 71st Cong., p. 9 ... 19
H. Rept. No. 2428, 76th Cong., p. 3 ... 19
H. Rept. No. 2245, 77th Cong., p. 10 ... 19, 20
H. Rept. No. 1287, 79th Cong., p. 5 ... 19, 20
Memorandum for the Use of the House Committee on the Judiciary, 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373:
Page 8 ... 17
Page 29 ... 23–24
Prosser on Torts (1941), pp. 194–197 ... 57
Reorganization Plan No. II, effective July 1, 1939, Section 2 (a), 53 Stat. 1432 ... 13
Restatement of Torts, § 288, Comment a ... 43, 53
S. 2690, Sec. 201, 76th Cong., 1st Sess ... 23
S. Rept. No. 1196, 77th Cong., p. 7 ... 20
S. Rep. No. 1400, 79th Cong., p. 31 ... 19
United States Coast Guard, *Aids to Marine Navigation of the United States* (C. G. 193, 1949) pp. 28–29 ... 12

Miscellaneous—Continued

Page

United States Coast Guard, *Aids to Navigation* (C. G. 127, 1945) p. 1201 15

United States Coast Guard, *Aids to Navigation Manual* (C. G. 222, Jan. 1953), pp. 4-1-4-3.

United States Coast Guard, *Aids to Navigation Operated and Maintained by the United States and Coast Guard* (June 30, 1953) p. 1 12

United States Coast Guard, Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158):

Page 5 5

Page 498 5

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 213

INDIAN TOWING COMPANY, INC., ET AL., PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The order of the District Court dismissing the suit (R. 11) was entered without an opinion. The *per curiam* opinion of the Court of Appeals (R. 18–19) is reported at 211 F. 2d 886.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1954 (R. 19). The petition for a writ of certiorari was filed on July 15, 1954, and was granted on October 14, 1954 (R. 20). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether a claim may be maintained against the United States under the Federal Tort Claims Act for damage to a vessel's cargo resulting from the allegedly negligent failure of a lighthouse to operate.

STATUTES INVOLVED

1. The relevant provisions of the Federal Tort Claims Act[1] are as follows:

28 U. S. C. 1346 (b).

> Subject to the provisions of chapter 171 of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circum-

[1] The Federal Tort Claims Act was enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842, 28 U. S. C. 921 *et seq.* While subsequently repealed, its provisions were reenacted into law, under the revision of the Judicial Code, as 28 U. S. C. 1291, 1346, 1402, 1504, 2110, 2401, 2402, 2411, 2412, 2671–2680, effective September 1, 1948 (62 Stat. 869, 992). Except for insignificant alterations in language, the portions of the Act relevant to the instant suit remained unchanged.

stances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

* * * * * *

28 U. S. C. 2674.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * * *

28 U. S. C. 2680.

The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

2. 14 U. S. C. 81 provides:

Aids to navigation authorized

In order to aid navigation and to prevent disasters, collisions, and wrecks of

vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States;

(2) aids to air navigation required to serve the needs of the armed forces of the United States as requested by the Secretary of the appropriate department within the National Military Establishment; and

(3) Loran stations (a) required to serve the needs of the armed forces of the United States; or (b) required to serve the needs of the maritime commerce of the United States; or (c) required to serve the needs of the air commerce of the United States as determined by the Administrator of Civil Aeronautics.

Such aids to navigation other than loran stations shall be established and operated only within the United States, its Territories and possessions, the Trust Territory of the Pacific Islands, and beyond the territorial jurisdiction of the United States at places where naval or military bases of the United States are or may be located, and at other places where such aids to navigation have been established prior to June 26, 1948.

STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for property loss sustained, allegedly as a result of negligence on the part of Coast Guard personnel in the maintenance of a lighthouse on Chandeleur Island, Louisiana.

The complaint (R. 2–6) alleged that petitioner Indian Towing Company, Inc., is the owner of the tug *Navajo*. On October 1, 1951, while towing the barge *AS 16*, which had been chartered by petitioner Upper Mississippi Towing Corporation, the *Navajo* went aground on Chandeleur Island. The grounding allegedly was due solely to the failure of the light on Chandeleur Island to function on that date, which failure, in turn, was due to the negligence of officers and enlisted personnel of the Coast Guard (R. 4–5).[2] This alleged negligence was said to consist of (1) the inadequate examination of the light by one Chief Petty Officer Stone on his inspection trip of September 7, 1951, when he failed to discover a loose connection, (2) the failure of the Coast Guard

[2] The Chandeleur Island lighthouse was "an unwatched light," *i. e.*, no Coast Guard personnel were assigned to man it. It was described as such in the Light List outstanding on October 1, 1951. See United States Coast Guard, Light List, *Atlantic and Gulf Coasts of the United States*, corrected to January 1, 1951 (C. G. 158), pp. 5, 498. This publication also advised mariners that, while unwatched lights have a high degree of reliability, they "may become irregular or extinguished." *Ibid.*, p. 5.

to inspect the light between September 7, 1951, and October 1, 1951, in order to determine whether it was operating properly, and (3) the failure of the Coast Guard to repair the light or to notify vessels that it was not operating. As a result of the grounding, sea water entered the cargo space of the barge *AS 16* which held 1,204.25 tons of triple superphosphate consigned to petitioner Minnesota Farm Bureau Service Company, and insured under a policy issued by petitioner United Fireman's Insurance Company (R. 3). The phosphate was completely wetted and allegedly was damaged in the amount of $62,659.70.

The complaint was filed in the United States District Court for the Southern District of Mississippi on August 8, 1952 (R. 2). On motion of the United States (R. 5–6), the cause was transferred on September 15, 1952, to the Eastern District of Louisiana, the district in which the alleged negligence took place and the district in which one of the petitioners (Indian Towing Company) resided (R. 7–8).

The United States, on December 1, 1952, moved to dismiss the complaint (R. 8–9). On June 29, 1953, the District Court dismissed the complaint, relying on *Dalehite* v. *United States*, 346 U. S. 15 (R. 11). On appeal, the Court of Appeals affirmed in a *per curiam* opinion, citing *Dalehite* v. *United States*, 346 U. S. 15, and *Feres* v. *United States*, 340 U. S. 135 (R. 18–19).

SUMMARY OF ARGUMENT

Petitioners' assertion is that the United States, through the Coast Guard, negligently failed to operate a warning light as an aid to navigation, and as a result the tug *Navajo* went aground. The claim must fail because it involves a uniquely governmental function and the Tort Claims Act does not permit suit on such claims.

I

The operation of lighthouses as aids to navigation has been an important activity of the Federal Government since 1789. Today, the establishment, maintenance, and operation of lighthouses and of similar aids are functions performed exclusively by the Coast Guard. Private persons are prohibited, under criminal penalty, from engaging in the activity (except for very limited private purposes, under Coast Guard permission and supervision).

II

The Tort Claims Act does not permit recovery for damages caused by inadequate performance of a governmental function such as the maintenance of a navigational light.

A. 1. The legislative history of the Act and its express provisions demonstrate a clear Congressional purpose to exclude from its coverage claims arising from the performance of charac-

teristically or uniquely governmental functions. The provisions of the Act indicate two branches to this exclusion, one based upon Sections 1346 (b) and 2674, Title 28, U. S. C., which limit the liability of the United States to that of a "private" person in "like circumstances", and the other, based upon Section 2680 (a), which excepts claims arising from the performance of a "discretionary function." Though not mutually exclusive, each branch gives content to the exclusion and protects the United States from claims affecting activities primarily governmental in nature.

The first branch, based on Section 2674, bars claims arising from the misfunctioning of a governmental activity itself, *i. e.* failure to obtain the objective of the particular public activity in which the plaintiff is interested. Thus, if the Federal Bureau of Investigation or the police fail to prevent a bank robbery or if the Coast Guard or a fire department fail to extinguish a fire, no private cause of action accrues. Since these functions are unlike any carried on by a private person, there can be no parallel liability of a "private individual under like circumstances"; such liability has no analogy in the general common law of torts. And this Court has repeatedly emphasized that the Tort Claims Act permits suit only on "recognized causes of action" and does not "visit the Government with novel and unprecedented liabilities." *Feres* v. *United States*, 340

U. S. 135, 142; *Dalehite* v. *United States*, 346 U. S. 15, 43; *United States* v. *Brown*, Oct. T. 1954, No. 38, slip op., p. 3.

The second branch of the governmental-function exclusion, based on the "discretionary function" exception of Section 2680 (a), bars claims founded on regulatory or discretionary activities. But the exception is not limited to administrative decisions. It also takes meaning from the body of case law involving suits against cities and states for the negligent performance of governmental activities, which regularly hold that such negligence is not actionable.

2. The *Dalehite* case applied both branches of the governmental-function exclusion. Section 2680 (a) was held to govern the fertilizer phase of the case. That portion of the opinion which dealt with the asserted negligence of the Coast Guard in its firefighting and other public duties rests on Section 2674, and held that suit cannot be brought for malfunctioning of governmental activities closely comparable to that involved here. Other cases under the Tort Claims Act are in accord.

B. 1. In seeking to impose liability on the United States for its failure to operate the lighthouse efficiently, petitioners can point to no analogous private liability in like circumstances. Private persons do not engage in this kind of activity. Perhaps the closest analogy is the function of cities and states in their activities de-

signed to protect life and property of the community at large, particularly in connection with traffic on the highways. But it has long been established that these governments are not liable for negligence in such undertakings, and for the very reason that the functions are uniquely governmental. While a statute could change the rule, legislative purpose to do so must be expressed explicitly. In enacting the Tort Claims Act, it was the aim of Congress to retain this rule, and not to create a liability involving a potentially enormous financial burden.

2. In another aspect, the obligation of a government to protect life and property is one which is owed to the community as a whole, rather than to particular members of the public. Breach of that public duty does not create a private cause of action. Nor can liability for misfunctioning of a governmental activity be imposed on a principle akin to the Good Samaritan doctrine. Since all governmental activities are undertaken voluntarily with the expectation that the public will rely upon them, application of this doctrine would effectively wipe out the exclusion of governmental functions, contrary to the legislative purpose.

ARGUMENT

Petitioners sue the United States under the Tort Claims Act for the allegedly negligent failure of a Coast Guard navigation light, leading to the grounding of the tug *Navajo*. From the

country's beginning, the Federal Government has maintained such aids to navigation as an integral part of its public responsibility to promote the general safety of commerce. The Tort Claims Act was not designed to subject the United States to pecuniary liability for failure to fulfill this type of governmental duty. The keeping of lighthouses—like weather forecasting, police work, and fire-fighting—falls into the class of uniquely public or governmental activity, without private counterpart, which has never been subjected to liability under American law and which this Act does not reach.

I

AIDS TO MARINE NAVIGATION ARE MAINTAINED AND CONTROLLED BY THE COAST GUARD AS PART OF ITS GOVERNMENTAL RESPONSIBILITY

1. The maintenance of aids to marine navigation was one of the initial activities undertaken by the Federal Government. It was recognized at the very outset of the first session of Congress that the erection and maintenance of lighthouses and other navigation aids are properly functions of the Federal Government. By the Act of August 7, 1789, 1 Stat. 53, it was stipulated that the public treasury was to assume the expense of maintaining and repairing all existing lighthouses, beacons, and buoys, provided they were ceded to the United States within a period of one

year. The same Act directed the Secretary of the Treasury to provide for the building of a lighthouse in the entrance to the Chesapeake Bay, as well as for the manning and repairing of the ceded facilities. See, also, Act of May 15, 1820, 3 Stat. 598.

Twelve lighthouses which had previously been built by the colonies were immediately turned over to the Government and became the nucleus of a continuously expanding system of aids to marine navigation,[3] a system which on June 30, 1953, included 38,169 Government owned and operated aids.[4] In the beginning, the administration of the system was directly supervised by the Secretary of the Treasury; as his duties increased, this responsibility was delegated to subordinate officials. In 1852, a Lighthouse Board was created, consisting of officers in the Army and Navy and of civilian scientists. In 1903, the Board was transferred from the Treasury Department to the newly-created Department of Commerce and Labor,[5] and, in 1910, it was superseded by the Bureau of Lighthouses in the Department of Commerce. On July 1, 1939, the

[3] Except as otherwise noted, this historical summary is derived from U. S. Coast Guard, *Aids to Marine Navigation of the United States* (C. G. 193, 1949) pp. 28–29.

[4] U. S. Coast Guard, *Aids to Navigation Operated and Maintained by the United States and Coast Guard* (June 30, 1953) p. 1.

[5] Act of February 14, 1903, c. 552, § 4, 32 Stat. 825, 826.

Lighthouse Service was consolidated with the Coast Guard.[6]

2. In maintaining the lighthouse on Chandeleur Island and approximately thirty-eight thousand other federally established aids, the Coast Guard performs the general public duty outlined in 14 U. S. C. 81 (*supra*, pp. 3–4), which provides in relevant part that "[i]n order to aid navigation and to prevent disasters, collisions and wrecks of vessels * * * the Coast Guard *may* establish, maintain and operate: (1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States." And these federally maintained aids, which range from lightships to unlighted buoys, represent the overwhelming majority (90%) of the total number of aids which are to be found on the navigable waters of the United States, its territories, and possessions. Moreover, the Coast Guard has an absolute monopoly as to some type of aids. For example, it operates all of the 398 light stations (*i. e.* a lighted aid on a fixed structure to which personnel are assigned for the purpose of watching the light).[7]

In addition to the maintenance of more than 90% of all navigational aids on the navigable waters of the United States, the Coast Guard

[6] Reorganization Plan No. II, effective July 1, 1939, § 2 (a), 53 Stat. 1432.

[7] *Op. cit. supra*, fn. 4 at p. 1.

exercises direct and close supervision over the roughly 3,300 so-called "private" aids to navigation. These private aids are erected and serviced by municipal, state, or federal agencies, or by private industry, but only after the approval of the Coast Guard has been obtained.[8] They generally take the form of either unlighted buoys, day beacons, or lights upon fixed structures such as bridges,[9] and their construction is sanctioned

[8] Congress has made it a criminal offense for any "person, or public body, or instrumentality, excluding the armed services," to "establish, erect, or maintain any aid to maritime navigation without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations" (14 U. S. C. 83). This prohibition has existed for almost fifty years. See Act of June 20, 1906, 34 Stat. 321, 324. It is also a criminal offense for any person to interfere with an aid to navigation (14 U. S. C. 84). Pursuant to these sections, and 14 U. S. C. 92, which confers upon the Secretary of the Treasury broad powers in regard to carrying out the functions delegated to the Coast Guard, regulations have been promulgated governing the establishment and maintenance of private aids. These regulations cover such matters as the application procedure, the required characteristics of the private aid, inspection by the Coast Guard, and the circumstances in which a private aid must be removed. See 33 C. F. R. (1949 ed.) §§ 66.01–1—66.01–35. Private aids lawfully maintained receive the same protection against interference or obstruction as is afforded by law to Coast Guard aids to navigation. See 14 U. S. C. 84; 33 C. F. R. (1949 ed.) §§ 66.01–50, 70.01–1.

[9] Of the 3301 private aids in operation on June 30, 1953, 3073 fell into one of these categories. The balance were lighted buoys, fog signals, and shore-based radar stations. *Op. cit. supra*, fn. 4 at p. 12. There are no statistics available which reflect the proportion of the private aids which are maintained by governmental units as opposed to individuals or corporations.

where it has been administratively determined (1) that the aid is to be used *exclusively by the agency or private person* and will *not* serve general navigation, the interest which the Coast Guard is charged to protect,[10] or (2) if the aid is to be placed on a fixed structure, that the owner of the structure is legally obligated to do so.[11]

3. This summary of history and present practice reveals the unique connection between the Coast Guard and the maintenance of lighthouses and other aids to public navigation. It is the Coast Guard's special mission to establish, service, and operate these aids. Private participation

[10] The Coast Guard in its manual on aids to navigation gives these examples of typical aids considered in the category of private aids [U. S. Coast Guard, *Aids to Navigation* (C. G. 127, 1945) p. 1201]:

(1) Standard buoy and lighting equipment employed by the United States Engineers to mark dredging areas.

(2) Buoys, ranges and sound signals in channels dredged by private corporations to their property, which channels are used exclusively by the corporation's, or its contractor's, vessels.

(3) Aids established by the Army and Navy for their own use in connection with the approaches to loading piers, etc.

See also, U. S. Coast Guard, *Aids to Navigation Manual* (CG–222, Jan. 1953), pp. 4–1, 4–3.

[11] Coast Guard regulations require all persons owning, occupying, or operating bridges over the navigable waters of the United States to maintain at their own expense such lights required for the safety of marine navigation as may be prescribed by the Commandant. 33 C. F. R. (1949 ed.) § 68.01–1. In addition, there is a non-delegable duty imposed upon the owner of a sunken wreck to mark it. 33 U. S. C. 409; 33 C. F. R. (1949 ed.) 64.01–1.

is minimal. The activity is not one which the Government carries on along with private persons; there is no private parallel with the public job of keeping the lights.

II

CLAIMS AGAINST THE UNITED STATES BASED UPON THE PERFORMANCE OF A GOVERNMENTAL FUNCTION WITHOUT PRIVATE COUNTERPART, SUCH AS THE MAINTENANCE BY THE COAST GUARD OF A NAVIGATIONAL LIGHT, ARE EXCLUDED FROM THE COVERAGE OF THE TORT CLAIMS ACT

It would impose a liability novel and unprecedented in American law to hold a government answerable for the negligent performance of, or the failure to fulfill, a uniquely governmental or public responsibility like the maintenance of a lighthouse. Enacted as a conservative remedy for the injustice and inconvenience flowing from the Government's immunity from liability for common-law torts, the Tort Claims Act did not reach into such new and uncharted fields. The key to the Act's limited purpose, as well as its coverage, is found in Sections 2674 and 1346 (b) of Title 28 which emphasize that the only liability assumed by the United States is that which a "private individual" or "private person" would have "under like circumstances". Together with the "discretionary function" exception of Section 2680 (a), those provisions preclude recovery when, as here, the claim is one which, because of the characteristically governmental factors involved, cannot rightly be equated to a suit of one

private individual against another. *Feres* v. *United States*, 340 U. S. 135, 141–142; *Dalehite* v. *United States*, 346 U. S. 15, 28, 32, 43–44.

A. THE ACT COVERS ONLY "PRIVATE" TORTS

1. *The limiting provisions of the Act.*—As this Court clearly recognized in *Dalehite* v. *United States*, 346 U. S. 15, although the Tort Claims Act constitutes a broad waiver of the Government's immunity from suit, the waiver is far from unlimited. The sponsors and the draftsmen of the legislation, in explaining some of the limitations, stated that since permitting suit against the sovereign for tort would be "a radical innovation," it was wise to proceed cautiously;[12] certain torts regarded as difficult to defend, and claims based on governmental activities which "should be free from the restraint of damage suits," were deliberately excluded from coverage.[13] It was recognized in Congress that because of these restrictions there would still be occasion for the private bill remedy—in instances of hardship or moral obligation or in other equitable situations where the terms of the statute barred recovery.[14]

[12] Hearings before Subcommittee No. 1 of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess., on H. R. 7236, p. 22.

[13] *Ibid.*; Memorandum for the Use of the Committee on the Judiciary, 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373, p. 8.

[14] See, *e. g.*, Hearings before a Subcommittee of the Committee on the Judiciary, U. S. Sen., 76th Cong., 3d Sess., on S. 2690, pp. 34, 38, 39, 52–53; Hearings before Subcommittee

And this Court has declared that just as the waiver of immunity must be given a construction which will accomplish its aim, so, too, the Act must be interpreted with "due regard for the statutory exceptions" and for "such restrictions as have been imposed" upon the right to sue. *Dalehite* v. *United States*, 346 U. S. 15, 31.[15]

a. One of the basic limitations upon the coverage of the statute is the exclusion of claims arising from the performance of acts of a dominantly governmental nature. "The legislative history indicates," this Court said after extensively reviewing that history, "that * * * it was not contemplated that the Government should be subject to liability for acts of a governmental nature or function." *Dalehite, supra*, 346 U. S. at pp. 27–28. "* * * Congress exercised care to protect the Government from claims, however negligently caused, that affected the governmental functions." *Ibid.*, at 32.

This conclusion is supported by the legislative hearings, reports and debates.[16] The Tort Claims Act was enacted in 1946 as Title IV of the Legis-

---

No. 1, of the Committee on the Judiciary, H. of Reps., 76th Cong., 3d Sess. on H. R. 7236, pp. 15, 22.

[15] In addition to the exceptions and conditions discussed in the text, Section 2680 excludes claims arising in a foreign country, claims flowing from combatant activities of the military forces in war time, claims arising from specific torts such as assault, battery, false arrest, libel, etc.

[16] For a more detailed survey of the history, see the Brief for the United States in *Dalehite*, Oct. Term 1952, No. 308, pp. 179 *ff.*

lative Reorganization Act, 60 Stat. 842, the culmination of "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." *United States* v. *Seplar*, 338 U. S. 217, 219–220. Throughout this period, as noted in *Dalehite*, 346 U. S. at 28, the prime legislative effort was to make the United States amenable for the "ordinary common law torts" such as are involved in automobile accidents, and that purpose was expressly reaffirmed when the Act was passed.[17] During this same time it was the consistent view of Congress that the important governmental functions should be protected and that suit should not be permitted, as stated by a member of the House Committee on the Judiciary, on "that class of tort on the part of the Government which has to do with a governmental function, so to speak."[18]

---

[17] See *e. g.*, 67 Cong. Rec. 11092, 11100; 69 Cong. Rec. 2192, 3118; Hearings before a Subcommittee of the House Committee on Claims, 72d Cong., 1st Sess., on a general tort bill (Feb. 1932), p. 17; Hearings on H. R. 7236, 76th Cong., 3d Sess. (April 1940), p. 16; Hearings on S. 2690, 76th Cong., 3d Sess. (March 1940), pp. 27–8; Hearings on H. R. 5373 and H. R. 6463, 77th Cong., 2d Sess. (Jan. 29, 1942), pp. 28, 37, 39, 66; H. Rept. No. 2428, 76th Cong., p. 3; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5; S. Rep. No. 1400, 79th Cong., p. 31.

[18] Representative Gwynne speaking on H. R. 7236, 76th Cong. (86 Cong. Rec. 12021). See also 67 Cong. Rec. 11086–11100; 69 Cong. Rec. 2191, 2196, 3117, 3127; H. Rept. No. 2800, 71st Cong., p. 9; 86 Cong. Rec. 12021–2; Hearings on H. R. 5373 and H. R. 6463, 77th Cong. (Jan. 1942), pp. 28.

b. This purpose was carried out through the vehicle of three Sections of the Act: 28 U. S. C. 1346 (b), 2674, and 2680 (a). Section 1346 (b) provides that the United States shall be liable for the negligent or wrongful acts of its employees[19] "under circumstances where the United States, *if a private person*, would be liable to the claimant." Section 2674 emphasizes that the United States assumes liability only "in the same manner and to the same extent *as a private individual under like circumstances*" (emphasis added). And Section 2680 (a) excludes claims based upon the exercise of a discretionary function or duty.

These provisions indicate two overlapping but independent branches to the governmental-function exclusion: the one, marked out by Sections 2674 and 1346 (b), bars recovery when the claim is one which, when viewed in all its circum-

---

33, 38, 45, 65, 66; S. Rept. No. 1196, 77th Cong., p. 7; H. Rept. No. 2245, 77th Cong., p. 10; H. Rept. No. 1287, 79th Cong., p. 5.

[19] It may be noted, in passing, that liability is conditioned upon a negligent or wrongful act or omission of a government employee while acting within the scope of his employment. 28 U. S. C. 1346 (b). The United States, therefore, may not be held liable for the negligence of its employees occurring while they are on a frolic of their own (*King* v. *United States*, 178 F. 2d 320 (C. A. 5), certiorari denied, 339 U. S. 964); nor, on the theory of absolute liability, for engaging in an extrahazardous activity (*Dalehite* v. *United States*, 346 U. S. 15, 45).

stances,[20] cannot be equated to a demand which one private individual can properly make against another; the second branch, in Section 2680 (a), bars recovery for conduct traditionally characterized as discretionary or regulatory even though there may be a private counterpart.

Included in the first class (the class primarily involved here), are those claims (a) which arise from an activity or relationship which is characteristically or uniquely governmental, and (b) where the essence of the claim is the negligent or wrongful performance, or the failure to perform, the activity *itself*. By characteristically or uniquely governmental, we mean those activities which now are, and historically have been, regarded as the special function or aim of government, as distinct from activities parallel to those carried on by private persons or groups, thus, the regulation or licensing of business, professional, or commercial activities; the prevention and fighting of fire; the apprehension of criminals and the furnishing of police protection; weather forecasting; traffic control; safety and sanitary inspections.

It is not, of course, all official conduct furthering in some way these governmental ends which is excluded from coverage; we are not seeking to establish for the Tort Act the "governmental"-

[20] The liability assumed by the Government is that created by *all* the circumstances, not those which a few of the circumstances might create. *Feres* v. *United States*, 340 U. S. 135, 142; *Dalehite* v. *United States*, 346 U. S. 15, 43.

"proprietary" classification of *general spheres of activity* which has grown up in American municipal law.[21] On our view, the plaintiff would be barred from suit, not in the routine case of collision with a truck carrying the Weather Bureau's mail, but only where his interest lies in attaining the end-objective of the particular government activity (*e. g.*, proper weather reports) and where the charged wrongful conduct (*e. g.*, negligence on the part of the forecasters) causes the government to fail in fulfilling that particular function, to the plaintiff's detriment. In such cases, the plaintiff's loss is asserted to be directly due to the government's failure to attain the governmental objective—proper regulation, or fire-fighting, or police protection, or weather forecasting, etc.

Compare the situation in which a governmental vehicle negligently strikes a pedestrian; there, the gravamen of the complaint would not be that the particular agency failed to fulfill its specific statutory function. So far as that complainant would be concerned, whether or not the agency (*e. g.*, the Weather Bureau) attained its objective would be totally irrelevant to his claim.

[21] We emphasize again, as we did in *Dalehite* (Brief for the United States, Oct. Term, 1952, No. 308, pp. 189, 192 (fn.), 193), that it is *not* our position that every activity (including the driving of cars) connected in some way with a "governmental" function is immune under the Act. As the text points out, only certain particular conduct within the general sphere of activity is excluded. See *infra*, pp. 37 (fn. 35), 40.

He is interested only in the careful performance of the intermediate step of driving a truck. The Tort Claims Act was intended to permit such a suit, but not a case where the very gist of the claim is the negligent failure-to-function of the governmental activity itself.[22]

Where the claim is of this nature, it may be unnecessary to look beyond Section 2674 to find that recovery is barred, even though the challenged conduct also may be within the classical meaning of the words "discretionary function" as used in Section 2680 (a).[23] Regardless of whether "discretion" is involved, the determinative factor is the characteristically governmental nature of the activity which itself, through its alleged failure to function so as to attain its aim, directly caused the damage.[24] The negligence of

[22] The same distinction was made in the Committee Reports explaining the Section 2680 (a) exception. It was stated that while the Act was intended to permit suit for claims arising from a collision with a regulatory agency's vehicle, it was not intended to cover claims based upon the regulatory activities of the agency. See Reports cited in *Dalehite*, 346 U.S. at fn. 21, pp. 29-30.

[23] See *infra*, fn. 25, p. 26.

[24] It is significant that the language of what is now Section 2674 had appeared in proposed bills before the discretionary function language of Section 2680 (a) was injected (e. g., S. 2690, Sec. 201, 76th Cong., 1st Sess.; H. R. 5299, Sec. 201, 77th Cong., 1st Sess.), and it was believed that even without the 2680 (a) exception claims falling under it would have been barred. Hearings before the Committee on the Judiciary, H. of Reps., 77th Cong., 2d Sess., on H. R. 5373 and H. R. 6463, pp. 29, 35; Memorandum for the Use of the

Army personnel in failing to protect a citizen, the carelessness of FBI agents in failing to prevent a bank robbery, the negligence of the Coast Guard in extinguishing a fire, would not create actionable private rights. In each instance the claim for damages would be based upon the failure of the Government properly to perform certain special or unique functions of government. Since these functions are unlike any carried on by a private individual, there can be no analogous private liability "under like circumstances" and the claims would be barred by Sections 2674 and 1346 (b). Cf. *Feres* v. *United States*, 340 U. S.

Committee on the Judiciary, H. of Reps., 77th Cong., 2d Sess., Explanatory of Committee Print of H. R. 5373, p. 29. The remarks of Representative Gwynne quoted above (p. 19), that the purpose was to exclude claims relating to governmental functions, were made in connection with a bill (H. R. 7236, 76th Cong.) which contained the present Section 2674 language but not that of Section 2680 (a). Commenting with reference to the Section 2674 language in such an earlier bill, a Department of Justice representative said, "* * * [T]his section waives the Government's immunity to suit, and places the Government in the same position as regards liability for these claims as a *private* individual or corporation would be when it is sued." Hearings before a Subcommittee of the Com. on the Jud., U. S. Sen., 76th Cong., 3d Sess., on S. 2690, p. 37. "The bill is, of course, limited to those tort claims which the law would recognize as justiciable, and for which a recovery could be had in the event that the defendant were a *private* individual or a *private* corporation, as the bill merely waives the immunity of the United States against being sued." *Ibid.*, p. 34; and see *id.*, p. 51. (Emphasis added.) Compare, *Turner* v. *United States*, 248 U. S. 354, 358 (*infra*, p. 55).

135, 141–142; *Dalehite* v. *United States*, 346 U. S. 15, 43–44. On three different occasions, this Court has emphasized that the effect of the Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres, supra; Dalehite, supra; United States* v. *Brown*, Oct. T. 1954, No. 38, slip op., 3 (Dec. 6, 1954). The Act permits recovery only where there is "an established type of liability" (cf. *United States* v. *Gilman*, 347 U. S. 507, 509). As we show more fully below (*infra*, pp. 40 *ff.*), that type of liability does not exist in American law when a government fails in fulfilling its uniquely public responsibilities.

c. Section 2680 (a), on the other hand, excludes claims based upon the exercise of a discretionary function or duty even though the activities involved are comparable to those carried on by a private person. It avoids the possibility of testing the validity of legislation or regulations through the device of a suit for damages for tort, and it excludes suits based upon administrative action of a regulatory nature or relating to the execution of a Federal project, and the like. *Dalehite*, 346 U. S. at 27. The words "discretionary function" mean a product of official "policy judgment and decision" or "the discretion of the executive or the administrator to

act according to one's judgment of the best course" (*ibid.*, at 36, 34).[25]

As noted above, some claims fall readily under the bar of Section 2674 (*e. g.*, one based upon the Coast Guard's dereliction in its public fire-fight-

[25] The concept expressed by the words "discretionary function" also encompasses the carrying out of a uniquely governmental activity such as the promulgation or enforcement of law (*Dalehite*, 346 U. S. at 43). The words have a "substantial historical ancestry in American law" (*ibid.*, at 34; *Coates* v. *United States*, 181 F. 2d 816, 818 (C. A. 8)). Their meaning was developed through the years in cases involving (a) mandamus or injunction actions to compel the performance of discretionary duties (*e. g.*, *Louisiana* v. *McAdoo*, 234 U. S. 627, 633), (b) damage suits against public officials for carrying out official discretionary duties (*e. g.*, *Spalding* v. *Vilas*, 161 U. S. 483, 498–499), and (c) suits against municipalities and states for injuries resulting from the performance of certain governmental or discretionary functions (*e. g.*, *Johnston* v. *District of Columbia*, 118 U. S. 19, 21; *Barrett* v. *State of New York*, 220 N. Y. 423; *Steitz* v. *City of Beacon*, 295 N. Y. 51). The controlling principle to be drawn from these three bodies of law is that it is not the place of the courts either to revise, supervise or control executive conduct involving the exercise of judgment or discretion of a public character, or to review the manner in which functions of government are carried out. While the first two categories are, to a large extent, comprised of cases involving discretionary administrative acts of regulatory authorities, the last goes well beyond, for it also involves claims arising from activities which, while not necessarily regulatory, are nevertheless uniquely governmental. And there, in barring recovery, the courts simply point out that the activity is "governmental" or "discretionary", using the words interchangeably. (See generally the cases cited below, p. 40 *et seq.*) It is primarily in this third category that the discretionary function language of Section 2680 (a) may coincide with and exclude the same type of claim as does Section 2674.

ing duties), without regard to the question of administrative discretion. They are based upon the failure of a uniquely governmental activity to function properly, and cannot be analogized to circumstances giving rise to private liability. Other claims may fall wholly within Section 2680 (a), as in the case of a claim based upon the manner in which Federal funds are expended. Still others, however, may come within the bar of both sections, for example, a claim based upon negligence of the Civil Aeronautics Board in promulgating an inadequate airplane inspection regulation. Such a claim would be excluded by Section 2680 (a) because it arises from an administrative discretionary act. In addition, the regulation of aircraft and air carriers is a uniquely governmental function without any private counterpart (see 49 U. S. C. 401 *et seq.*), and the claim would also be precluded by failure to meet the requirements of Section 2674. Thus, the two branches of the governmental-function exclusion complement as well as overlap each other, both insuring protection against claims affecting purely governmental activities.

2. *The decisions under the Act.*—a: The ruling in *Dalehite* v. *United States*, 346 U. S. 15, crystallizes and applies both aspects of the governmental-function exclusion. Petitioners' contention that the court below misconceived *Dalehite* and that "the whole basis" of the *Dalehite* decision was "wrongful discretionary administrative

action" (Pet. Br. 5–7) stems from their failure to perceive the two facets of the "governmental" exception.

It will be recalled that in *Dalehite*,[26] apart from the asserted carelessness in the adoption of the fertilizer program as a whole, the trial court's findings of negligence related, first, to alleged negligence in the manufacture, bagging, and shipment of a dangerous product (346 U. S. at 23, 37–42, 46–47), and second, to the alleged negligence of the Coast Guard in failing properly to carry out its duties of policing the shipboard loading of the dangerous substance and of discovering and extinguishing the fire (346 U. S. at 23–24, 42–43).[27] The *Dalehite* opinion considered each type of alleged negligence separately.

As to the alleged negligent manufacture, packaging, and shipment of FGAN, the Court was dealing with activities each of which had a private counterpart. Accordingly, the test of Section 2674

---

[26] *Dalehite* was a test case involving personal and property claims resulting from the disastrous explosion at Texas City, Tex., of fertilizer grade ammonium nitrate (FGAN). The FGAN had been produced for the United States pursuant to a program designed to increase the food supply of devastated areas in occupied enemy territories following World War II. The United States undertook the program to meet its obligation as an occupying power and to dispel the dangers of internal unrest. 346 U. S. at 17, 19.

[27] The district court's Findings of Fact in *Dalehite* appear in Vol. 2, pp. 882 *et seq.*, 900, 831 *et seq.*, of the printed record filed in this Court, October T. 1952, No. 308. The court found the Coast Guard negligent in failing to enforce com-

was met in this phase of the case. Where, however, the activity giving rise to the claim is one in which private persons normally engage, it may become necessary to inquire whether the negligent acts were discretionary within the meaning of Section 2680 (a). This Court made that inquiry in *Dalehite* and concluded that although the employees at the operational level did not themselves exercise any discretion or independent judgment in the manufacture, bagging, and shipment of the fertilizer, each of their acts held to have been negligent was specifically directed by a plan (346 U. S. 38–39), which plan was itself the product of policy judgment and the exercise of discretion by their superiors (346 U. S. 35–36). This brought the discretionary function exception into play: the non-discretionary "acts of subordinates in carrying out the operations of government in accordance with official directions cannot be actionable. If it were not so, the protection of § 2680 (a) would fail at the time it would be needed" (346 U. S. 36).[28]

---

pliance with existing Army, Coast Guard and ICC safety regulations, and in failing to promulgate other appropriate regulations. It found also that the Coast Guard had been negligent in failing to discover the fire promptly on the vessels, in failing to remove the vessels from the harbor after the fire was discovered, and in failing to extinguish and prevent the spread of the fires in Texas City.

[28] This Court did not restrict the discretionary function exception merely to high level policy judgment and deny it to discretionary acts at the operational level. On the contrary, the Court observed that the language of Section 2680

Unlike the FGAN aspect of the case, the alleged derelictions of the Coast Guard presented the Court with claims based upon the manner in which characteristically governmental activities were performed—activities which had no private parallel and which could not be analogized to a situation predicating private liability in like circumstances. It was therefore unnecessary to consider whether or not "discretion" had been exercised. The Court refused even to consider the specific findings of Coast Guard negligence (346 U. S. at 41–44). Applying the Section 2674 branch of the governmental-function exclusion, the Court said (346 U. S. at 42–44):

(a) covers "Not only agencies of government * * * but *all* employees exercising discretion" (346 U. S. at 33, emphasis ours) and went on to say, "It is unnecessary to define, apart from this case, precisely where discretion ends" (346 U. S. at 35).

Illustrative of other cases barring claims stemming from discretionary administrative action are *Schmidt* v. *United States*, 198 F. 2d 32 (C. A. 7), certiorari denied, 344 U. S. 896 (SEC investigation); *Matveychuk* v. *United States*, 195 F. 2d 613 (C. A. 2), certiorari denied, 344 U. S. 845 (OPA denial of rent increase); *Chournos* v. *United States*, 193 F. 2d 321 (C. A. 10), certiorari denied, 343 U. S. 977 (failure to grant grazing permit); *Smart* v. *United States*, 207 F. 2d 841 (C. A. 10) (release of a mental patient from a Government hospital). Some of these claims would also be barred by Section 2674, as having no private analogy. As to the exclusion of suit for negligence in policies and plans for authorized governmental activities which have analogous private counterparts see also cases discussed in *Dalehite*, 346 U. S. at fn. 32, pp. 36–37. And see, *Harris* v. *United States*, 205 F. 2d 765 (C. A. 10) (damage from airplane spraying while eradicating mosquitoes).

The findings of negligence on the part of the Coast Guard in failing to supervise the storage of the FGAN, and in fighting the fire after it started, were rejected by a majority of the Court of Appeals. 197 F. 2d, at 777, 780, 781. We do not enter into an examination of these factual findings. We prefer, again, to rest our decision on the Act.

* * * * *

As to the alleged failure in fighting the fire, we think this too without the Act. The Act did not create new causes of action where none existed before.

> "* * * the liability assumed by the Government here is that created by 'all the circumstances', not that which a few of the circumstances might create. We find no parallel liability before, and we think no new one has been created by, this Act. Its effect is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." *Feres* v. *United States*, 340 U. S. 135, 142.

It did not change the normal rule that an alleged failure or carelessness of public firemen does not create private actionable rights. Our analysis of the question is determined by what was said in the *Feres* case. See 28 U. S. C. §§ 1346 and 2674. The Act, as was there stated, limited United States liability to "the same man-

ner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Here, as there, there is no analogous liability; in fact, if anything is doctrinally sanctified in the law of torts it is the immunity of communities and other public bodies for injuries due to fighting fire. This case, then, is much stronger than *Feres*. We pointed out only one state decision which denied government liability for injuries incident to service to one in the state militia. That cities, by maintaining fire-fighting organizations, assume no liability for personal injuries resulting from their lapses is much more securely entrenched. The Act, since it relates to claims to which there is no analogy in general tort law, did not adopt a different rule. See *Steitz* v. *City of Beacon*, 295 N. Y. 51, 64 N. E. 2d 704. To impose liability for the alleged nonfeasance of the Coast Guard would be like holding the United States liable in tort for failure to impose a quarantine for, let us say, an outbreak of foot-and-mouth disease.[29]

[29] While the dissenting Justices were of the view that plaintiffs were entitled to recovery, they did not take issue with the majority of the Court as to the Coast Guard aspect of the case. All had joined in the opinion in the *Feres* case on which the majority relied in holding that the Coast Guard was immune from liability under the Tort Claims Act (340 U. S. at 43–44); indeed, the *Feres* opinion was written by Mr. Justice Jackson, the author of the dissent in *Dalehite*. Instead, the dissenting Justices found that the circumstances surrounding the manufacture and shipping of the FGAN

In *Feres*, dealing with negligently caused injuries to soldiers on active duty, the Court had previously pointed out the absence of a private law analogy in resting its decision against coverage on the unique relationship between the

---

afforded a basis for imposing liability. And, in doing so, they laid emphasis on the fact that activity of this nature has a private counterpart. "The Government, as landowner, as manufacturer, as shipper, as warehouseman, as shipowner and operator, is carrying on activities indistinguishable from those performed by private persons. * * * The Government's negligence here was not in policy decisions of a regulatory or governmental nature, but involved actions akin to those of a private manufacturer, contractor, or shipper" (346 U. S. at 60).

It should be observed, also, that of the three Circuit Judges who heard the instant case in the court below (Hutcheson, Ch. J., Borah and Holmes, J. J.), the first two had filed the dissenting opinion in the *Dalehite* case when it was before the Court of Appeals for the Fifth Circuit sitting *en banc*. 197 F. 2d 771, 782. In holding that the United States could not be liable under the Tort Claims Act for negligence in these public activities of the Coast Guard, the majority opinion had declared in *Dalehite* that, "There are no functions of private individuals comparable to those with which the Coast Guard is charged by statute," and had pointed to the language of Sections 1346 (b) and 2674 as well as to the *Feres* decision to demonstrate that, as a prerequisite to imposing liability on the United States, the claimants must show analogous private liability in like circumstances. 197 F. 2d 780. The dissenters there, like the Justices who dissented in this Court, did not express disagreement on this aspect of the case. They, too, would have contemplated liability, not on the basis of the defalcation of the Coast Guard in connection with uniquely governmental duties, but on the ground that the United States, as a manufacturer of a dangerous product, should be held liable just as a private manufacturer would be. 197 F. 2d at 786.

claimants and the United States.[30] Illustrative lower court cases barring liability on the ground that there was no comparable private liability are *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (claims based upon the negligent calculation of a weather report issued by the U. S. Weather Bureau);[31] *Sigmon* v. *United States*, 110 F. Supp. 906, 910 (W. D. Va.) (action by a federal prisoner for injuries sustained in prison);[32] cf. *P. Dougherty Co.* v. *United States*, 207 F. 2d 626 (C. A. 3), certiorari denied, 347 U. S. 912 (suit

---

[30] The Court said (340 U. S. at 141):

> * * * One obvious shortcoming in these claims is that plaintiffs can point to no liability of a "private individual" even remotely analogous to that which they are asserting against the United States. We know of no American law which ever has permitted a soldier to recover for negligence, against either his superior officers or the Government he is serving. Nor is there any liability "under like circumstances," for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command.

[31] "If the activity is purely governmental there can be no liability under the Act * * *. * * * The [weather] service is plainly of a governmental nature or function intended for the public at large and wholly for governmental purposes. It is disassociated from any private business counterpart * * *." 210 F. 2d at 277.

[32] "A private individual would never find himself 'under like circumstances' to those alleged in the complaint, because no private individual has the legal right to hold any other private individual in penal servitude." 110 F. Supp. a. 910.

under the Public Vessels Act for alleged negligence by Coast Guard in rescue operations).

b. In their brief, petitioners avoid any discussion of the "no analogous private liability" phase of the *Dalehite* opinion. Nor do they make any mention of the test of Section 2674. Instead, they argue only that their claim is not within the bar of Section 2680 (a). To sustain their view they refer to a number of cases in lower federal courts, all decided prior to *Dalehite*, and contend that it is unreasonable to assume that this Court disapproved those cases in *Dalehite* without specifically mentioning them. Of these cases, *Somerset Seafood Co.* v. *United States*, 193 F. 2d 631 (C. A. 4), and *Mid-Central Fish Co.* v. *United States*, 112 F. Supp. 792 (W. D. Mo.) are the only ones which can possibly be said to support petitioners.[33]

---

[33] *Wickman* v. *Inland Waterways Corp.*, 78 F. Supp. 284 (D. Minn.), dealt with the proposition that the Federal Tort Claims Act provided an exclusive remedy for allegedly tortious acts of employees of the Inland Waterways Corporation. *Lacey* v. *United States*, 98 F. Supp. 219 (D. Mass.), held that the United States was not liable for failure of the Coast Guard to effectuate a rescue. *State of Maryland, for Use of Pumphrey* v. *Manor Real Estate and Trust Co.*, 176 F. 2d 114 (C. A. 4), held that a real estate company there involved was an agent or employee of the United States and not an independent contractor. *Hernandez* v. *United States*, 112 F. Supp. 369 (D. Hawaii), involved a situation where analogous private liability could be found and the Government did not raise the defense of Section 2674. *Moran* v. *United States*, 102 F. Supp. 275 (D. Conn.), held that a suit could be maintained under the Federal Tort Claims Act for death on the high seas.

In *Somerset Seafood*, the Fourth Circuit rejected the contention that the Tort Claims Act "was not intended to impose liability on the United States for damages arising out of what are essentially 'governmental' functions as distinguished from those which might be carried on by private individuals" (193 F. 2d at 635). In doing so the court thrust to one side this Court's views to the contrary in *Feres*, 340 U. S. at 141, and, instead relied upon and quoted an earlier district court opinion, *Cerri* v. *United States*, 80 F. Supp. 831, 833, which pre-dated *Feres*. This portion of the *Somerset Seafood* decision was expressly urged upon this Court in the *Dalehite* case by petitioner Pan-American Refining Corporation, et al. (Br. pp. 232–237). The problem was discussed by the Government in its brief in *Dalehite*, No. 308, Oct. Term, 1952, pp. 171–184, 203–212. We believe that this Court repudiated the above-quoted remark in *Somerset Seafood* when the *Dalehite* opinion concluded that the Tort Claims Act does not subject the United States to liability "arising from acts of a governmental nature or function" (346 U. S. at 28; and see *id.*, at 32), and when it reiterated the *Feres* holding that unless there is analogous private liability in like circumstances, the claim is barred under the Act (346 U. S. at 43–44). Therefore, insofar as *Somerset Seafood* and *Cerri* hold that the Act does embrace claims for the non-functioning of a purely govern-

mental activity, they are in direct conflict with both *Dalehite* and *Feres*, and to that extent are no longer of any precedential value.[34]

That is equally true of the passage from the *Mid-Central Fish Co.* opinion which petitioners quote (Pet. Br. pp. 9–10), for there the district judge was using the *Somerset Seafood* and *Cerri* cases as his authority. *Mid-Central Fish Co.* was heard on appeal after the decision in *Dalehite;* significantly, the Eighth Circuit rejected petitioners' view. *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 277–278, certiorari denied, 347 U. S. 967.[35]

---

[34] In *Somerset Seafood*, plaintiff sued for damages for the sinking of its ship allegedly resulting from the Coast Guard's negligent marking of a wrecked vessel. The United States was the original owner of the wrecked vessel. It had itself created the dangerous condition in the waters. The initial duty of removing or marking a wrecked vessel rests upon the owner until abandonment of the vessel. After abandonment, the duty devolves upon the Coast Guard, under the Wreck Acts. 33 U. S. C. 409; 14 U. S. C. 86. Thus, while we think that *Somerset Seafood* was incorrectly decided, it is arguable that the decision is distinguishable on its facts in that the liability there imposed upon the United States had an analogous private counterpart.

[35] One reason given by the courts in *Somerset Seafood* (193 F. 2d at 635) and *Mid-Central Fish Co.* (112 F. Supp. at 795) for refusing to accept the contention that claims arising from the performance of a governmental function are not cognizable under the Tort Claims Act was that the distinction between governmental and proprietary activities has been held, in non-Tort Claims Act cases, not applicable to the Federal Government. Cf. *Federal Crop Ins. Corp.* v. *Merrill*, 332 U. S. 380, 383. But our contention with refer-

B. THERE IS NO ANALOGOUS PRIVATE LIABILITY IN LIKE CIRCUMSTANCES

Measured by the standards we have just discussed (*supra*, pp. 16–37), petitioners can have no claim under the Tort Claims Act. As we have already shown, the construction, maintenance and operation of lighthouses and of other general navigational aids are functions which, from the earliest days of our country, have been performed by the Federal Government (*supra*, pp. 11–16). More than that, for almost half a century, Congress has expressly prohibited any private person or other public body from undertaking this function except for very limited private purposes (*supra*, fn. 8 at p. 14). Where the activity which itself causes the damage is peculiarly governmental and prohibited to private persons, it is

---

ence to Section 2674 is not based on this dichotomy so familiar and often so confusing in the area of a municipal corporation's liability for tort. See 37 Am. Jur. pp. 727–730; 38 *id.*, pp. 261 *et seq.* On the contrary, we have always recognized that, to cite one example, the Act applies to the negligent operation of a government vehicle irrespective of whether that vehicle was being employed in connection with a "governmental" or a so-called "proprietary" function. What we have urged, instead, is that Section 2674 prohibits the imposition of liability for the assertedly negligent performance of the governmental function *itself*. As we indicate below (p. 39), it is doubtful that Section 2674, which restricts the liability of the United States to that of a *private* individual, permits any comparison with municipal liability. Even making the comparison, however, we need not and do not adopt the "governmental-proprietary" distinction. See *supra*, pp. 21–22; *infra*, fn. 36, pp. 39–40.

especially difficult to perceive how there can be any analogous liability of a private person in like circumstances.

Since lighthouses and other navigational aids are established and maintained to afford safety in navigation and to prevent collisions and wrecks of vessels (14 U. S. C. 81), perhaps the closest analogy is supplied by the activities of a city or state in enacting and executing laws and ordinances intended to secure the safety, health, and well-being of the community. It must be remembered, however, that the only liability assumed by the United States under the Tort Claims Act is that of a "*private* individual" (28 U. S. C. 2674) or "*private* person" (28 U. S. C. 1346 (b)). These words leave little room for measuring the liability by that of a municipality or state or any other entity exercising governmental authority. Nevertheless, even if we indulge in the comparison and ignore the important adjective "private", treating "private individual" as including a city or state (see *Feres*, 340 U. S. at 142), the conclusion is one of no liability.[36]

[36] For purposes of Section 2674, it is not necessary to examine the reasons why a private person would not be liable in like circumstances; the fact that there is no liability is enough in itself. Since no private person engages in the kind of activity involved in this particular case, we are turning to the closest analogy available, that provided by similar activities of cities and states. We show below that no recovery is permitted against them in like circumstances. This bars petitioners' claims under Section 2674. Since one of

1. ***States and municipalities are not liable for the negligent performance of comparable activi-***

---

the primary reasons why cities and states are not liable is because the activities are held to be "governmental" or "discretionary", the instant case may also be brought within the Section 2680 (a) branch of the governmental-function exclusion as well. See fn. 25, *supra* at p. 26.

As we have noted (*id.*), the "discretionary function" concept of Section 2680 (a) is in some part derived from principles developed in suits against states and municipalities for injuries flowing from the performance of what are regarded as "discretionary" or "governmental" functions. In that connection, the distinction we make (as already noted) is not between the "governmental" and "proprietary" functions of a municipal corporation, but, if a comparison is to be made, between its "discretionary" and its "ministerial" functions. Though sometimes confused, these two sets of opposites are separate and distinct and rest on different bases. In some states, the rule of non-liability for "discretionary" functions of municipalities originally developed, in part, as an offshoot of the court's application of the state's sovereign immunity from suit to non-"proprietary" functions of the city as a governmental arm of the state. But, as it has developed throughout the country, the rule of non-liability for "discretionary" functions has broken away from dependence on the state's immunity from suit, as well as from the governmental-proprietary distinction, and now rests firmly on the judgment that it is unwise, in the absence of specific legislation, to hold municipalities liable to respond in damages to private persons for acts or omissions connected with functions truly involving governmental discretion or judgment. That this is now the foundation of the rule is shown by the course of decisions in the State of New York which has long had a general statute subjecting the state to suit in tort. See *Barrett* v. *State of New York*, 220 N. Y. 423; *Paige* v. *State of New York*, 269 N. Y. 352; *Goldstein* v. *New York*, 281 N. Y. 396; *Steitz* v. *City of Beacon*, 295 N. Y. 51; *Murrain* v. *Wilson Line*, 270 App. Div. 372, affirmed, 296 N. Y. 845; *Newiadony* v. *State*, 276 App. Div. 59.

ties.—Because municipalities and states do not maintain navigational aids for the public benefit, as they do police and fire departments and militias, there never has been the opportunity to assert private actionable rights precisely like those petitioners assert here.[37] There is, however, an abundance of case law reflecting an almost universal rule of American governmental liability law that, absent specific legislative mandate, the negligent performance of, or the negligent

---

[37] There has been a similar lack of opportunity in Great Britain but for a different reason. There the management of lighthouses and other navigational aids has been for several centuries vested in semi-public lighthouse authorities, the principal one being the Trinity House Corporation. Prior to 1854, these authorities were subsidized in large measure by pilotage, primage, and buoyage fees which were paid directly to them. And since that date, the servicing of navigational aids has been financed by light dues paid in to the Mercantile Marine Fund and the General Lighthouse Fund. These light dues, which are owing from all non-Crown ships plying English waters, are assessed either on a voyage basis or by way of periodic payment. See Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104) §§ 387, 417, 420; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) §§ 634, 635, 636, 638, 643, 648, 676 (1) (i); Merchant Shipping (Mercantile Marine Fund) Act, 1898 (61 & 62 Vict. c. 44) §§ 1, 5 (1); *Gilbert* v. *Corporation of Trinity House*, 17 Q. B. D. 795 (1886).

We know of no English case holding a lighthouse authority liable for the failure of a navigational aid to function properly. Cf. *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132. But even if there were decisions to this effect, they would have no bearing here since the Coast Guard does not receive payment from mariners using its facilities. As already seen, the Coast Guard, as an arm of the Government, maintains these aids as part of its general public duty.

failure to perform, governmental duties relating to the protection, safety and health of the community gives rise to no private actionable claim. The enactment of laws designed to accomplish such purposes and the duty of their execution are the primary kind of functions for which a government exists. The appropriate public officials are endowed with power to select the ways and means for performing these functions, and significant elements in the exercise of their judgment are public considerations different from those weighed by private persons. Accordingly, these functions are traditionally and universally regarded as "governmental" or as "discretionary." *Dalehite*, 346 U. S. at 43.

a. In the first place, whether or not a governing body will undertake specific activities for the purpose of protecting life and property is entirely discretionary. If it does undertake to secure these benefits for the public at large, the extent of the undertaking and the particular form it takes are not subject to judicial review because these duties are legislative in nature. *Ibid.*; *Weightman* v. *Corporation of Washington*, 1 Black 39, 49. Accordingly, a city or state cannot be held for failure to enact laws or ordinances which would have prevented injury if they had been passed and enforced.[38]

[38] See, *e. g.*, *Gutowski* v. *Mayor, etc. of City of Baltimore*, 127 Md. 502 (failure to set up inspection system which might have prevented explosion in Baltimore harbor); *Zywicki* v.

Similarly, it is regularly held that a governing body is not liable for the failure to enforce laws and ordinances which have been enacted for the purposes of safety and health.[39]

Jos. R. Foard Co., 206 Fed. 975 (D. Md.) (the same); *State* v. *General Stevedoring Co.*, 213 Fed. 51 (D. Md.), affirmed, 219 Fed. 827 (C. A. 4) (the same); *Mayne* v. *Curtis*, 73 Ind. App. 640 (failure to require bumper or derail at end of locomotive track); *Curran* v. *Chicago Gt. Western Ry. Co.*, 134 Minn. 392 (failure to require railroad gate crossings); *McGuinness* v. *Allison Realty Co.*, 46 Misc. 8, affirmed, 111 App. Div. 926 (failure to enact proper building code); *Smith* v. *Selinsgrove Borough*, 199 Pa. 615 (failure to prohibit dogs running at large); *Kelley* v. *City of Milwaukee*, 18 Wis. 83 (same for hogs); *Marth* v. *City of Kingfisher*, 22 Okla. 602 (same for horse racing on streets); *Kisther* v. *Indianapolis*, 100 Ind. 210 (failure to regulate railway running on street); *James* v. *City of Harrodsburg*, 85 Ky. 191 (failure to adopt ordinance on blasting).

[39] See, *e. g.*, *Restatement of Torts*, Sec. 288; *Kebert* v. *Board of Wilson County Com'rs*, 134 Kans. 401 (failure to appoint plumbing inspector); *Rusk* v. *Montgomery*, 89 Oreg. 93 (failure to supervise maintenance of wharf); *Kritchmar* v. *City of Atchison*, 133 Kans. 198 (failure to enforce anti-firecracker ordinance); *Remy* v. *City of Shenandoah*, 184 Iowa 1370 (same); *Salmon* v. *Kansas City*, 241 Mo. 14 (failure to enforce ordinance requiring license for blasting); *Hines* v. *City of Charlotte*, 72 Mich. 278 (failure to enforce zoning ordinance); *Harman* v. *City of St. Louis*, 137 Mo. 494 (same); *Ryan* v. *Kansas City*, 232 Mo. 471 (failure to enforce ordinance requiring lights and barriers around excavations); *City of Knoxville* v. *Hargis*, 184 Tenn. 262 (failure to enforce awning height ordinance); *Addington* v. *Town of Littleton*, 50 Colo. 623; *Town of Gainesboro* v. *Gore*, 131 Tenn. 35; *Everly* v. *City of Gas*, 95 Kans. 305 (all involving animals running at large contrary to ordinance); *City of Mansfield* v. *Brister*, 76 Ohio St. 270 (anti-sewage dumping ordinance); *Verguth* v. *City of Denver*, 19 Colo. App. 473 (ordinance against dumping ashes in unsafe place).

Finally, the negligent performance, or the failure to perform, by officers of the government of public duties relating to the protection of life and property imposes no liability upon the governing body.[40]

b. These principles apply specifically to state and municipal activities intended to secure safety

---

[40] *E. g.*, *Turner* v. *United States*, 248 U. S. 354 (failure to prevent destruction of property); *South* v. *State of Maryland*, 18 How. 396 (failure to preserve the peace); *Giordano* v. *City of Asbury Park*, 91 F. 2d 455 (C. A. 3), certiorari denied, 302 U. S. 745, 799 (false arrest); *The Nez Perce Tribe of Indians* v. *United States*, 95 C. Cls. 1, 9–11, certiorari denied, 316 U. S. 686 (failure to prevent removal of gold from tribal land); *City of New Orleans* v. *Abbagnato*, 62 Fed. 240 (C. A. 5) (failure to prevent a lynching); *Gianfortone* v. *City of New Orleans*, 61 Fed. 64 (C. C. E. D. La.) (same); *Steitz* v. *City of Beacon*, 295 N. Y. 51 (negligent fire protection); *Murrain* v. *Wilson Line*, 270 App. Div. 372, affirmed, 296 N. Y. 845 (negligence in controlling a crowd); *Young* v. *State of New York*, 278 App. Div. 997, affirmed, 304 N. Y. 677 (failure to inspect a bridge scaffolding); *Meadows* v. *Village of Mineola*, 190 Misc. 815, 72 N. Y. S. 2d 368 (negligent enforcement of building code); *Schuster* v. *City of New York*, 121 N. Y. S. 2d 735 (failure to provide police protection after notice of threats on life); *Wynkoop* v. *Mayor and City Council*, 159 Md. 194 (same); *Brogan* v. *Philadelphia*, 346 Pa. 208 (failure to protect a traveler on the highways); *Savage* v. *District of Columbia*, 52 A. 2d 120 (D. C. Mun. App.) (negligent police protection); *Annala* v. *McLeod*, 122 Mont. 498 (same); *Borough of Norristown* v. *Fitzpatrick*, 94 Pa. 121 (failure to halt firing of a cannon in street); *O'Rourke* v. *Sioux Falls*, 4 S. D. 47 (same); *Trower* v. *City of Louisiana*, 198 Mo. App. 352 (same); *Rhodes* v. *Kansas*, 167 Kan. 719 (failure to extinguish a fire); *Fisher* v. *City of Boston*, 104 Mass. 87 (same). And see, *United States* v. *Price*, 95 F. 2d 687 (C. A. 5), certiorari denied, 305 U. S. 601 (negligent inspection of infected animals).

on the highways, activities which are not unlike those of the United States in establishing navigational aids for safety at sea. The cases are numerous. There is, for instance, no liability for negligence in the enforcement of a one-way street ordinance[41] or a parking ordinance,[42] for failure to prevent automobile or horse racing on the streets,[43] for omission to stop bicycle riding on the sidewalks,[44] for failure to regulate a railway running on a street,[45] for allowing a street car to operate the wrong way on a one-way street,[46] for not enforcing regulations prohibiting or limiting vehicles on sidewalks.[47]

Because it is acting in a uniquely governmental capacity, the negligent failure of a city to maintain traffic guide lines, lights, warning signs, or other marks and signals necessary for the safe and orderly flow of traffic does not create actionable private claims. Thus, there is no liability for the failure to maintain or erect stop signs.

---

[41] *Doughty* v. *Phila. Rapid Transit Co.*, 321 Pa. 136.

[42] *White* v. *Casper*, 35 Wyo. 371; *Means* v. *Barnesville*, 28 Ga. App. 671; *Bradley* v. *Oskaloosa*, 193 Iowa 1072.

[43] *McCarthy* v. *Munising*, 136 Mich. 622; *Rose* v. *City of Gypsum*, 104 Kan. 412.

[44] *Jones* v. *Williamsburg*, 97 Va. 722; *Rogers* v. *City of Binghamton*, 101 App. Div. 352, affirmed, 186 N. Y. 595.

[45] *Kistner* v. *Indianapolis*, 100 Ind. 210.

[46] *Doughty* v. *Phila. Rapid Transit Co.*, 321 Pa. 136.

[47] *Roberson* v. *District of Columbia*, 86 A. 2d 536 (D. C. Mun. App.); *Tarbutton* v. *Town of Tennville*, 110 Ga. 90; *Rogers* v. *City of Binghamton*, *supra*; *Millett* v. *City of Princeton*, 167 Ind. 582; *Jones* v. *City of Williamsburg*, 97 Va. 722.

Kirk v. *City of Muskogee*, 183 Okla. 536; *Tolliver* v. *Newark*, 145 Ohio St. 517; *Powell* v. *Nashville*, 167 Tenn. 334. Nor for permitting traffic buttons, markers, or signs to become obliterated and difficult to see (*Blackburn* v. *City of St. Louis*, 343 Mo. 301; *Prewitt* v. *City of St. Joseph*, 334 Mo. 1228), for the negligent maintenance of safety zone marks (*City of Denver* v. *Forster*, 89 Colo. 246), or for the failure to light streets or sidewalks (*Wolff* v. *District of Columbia*, 196 U. S. 152). See also, *Sheppard* v. *Glossop Corporation*, [1921] 3 K. B. 132. Making a highway safe for travel is the exercise of a "governmental power". *Clain* v. *City of Burlington*, 202 F. 2d 532, 534 (C. A. 2) (per L. Hand, C. J., denying recovery against a city for its negligent failure to light up a "silent policeman"). In *Corruthers* v. *City of St. Louis*, 341 Mo. 1073, the plaintiff sustained injuries when his auto climbed a curb. He had been following a traffic guide line which, instead of marking the middle of the road, led to the curb. His claim for damages, based upon the city's negligence in failing properly to maintain the line and to have adequate lights or other warning of the curb, was rejected on the ground that the regulation of traffic is a governmental function.

The same rule applies when cities are sued for the negligent misdirection of traffic on the public highways. In *Ferrier* v. *City of White Plains*,

262 App. Div. 94, leave to appeal denied, 287 N. Y. 852, recovery was denied where the injuries resulted from a driver's compliance with a traffic policeman's signal to proceed into an intersection.[48]

Actions have frequently been brought against cities because of a collision caused by negligent maintenance of automatic traffic signals, *e. g.*, lights in both directions showing green at the same time, or one side green and the other failing to show red. Here, too, by the overwhelming weight of authority, the city is held free of liability because the activity involved is a governmental function. See *e. g. Dorminey* v. *Montgomery*, 232 Ala. 47; *Avey* v. *West Palm Beach*, 152 Fla. 717; *Sandmann* v. *Sheehan*, 279 Ky. 614; *Edwards* v. *City of Shreveport*, 66 So. 2d 373 (La. Ct. App.); *Auslander* v. *St. Louis*, 332 Mo. 145; *Vickers* v. *Camden*, 122 N. J. L. 14; *Hodges* v. *City of Charlotte*, 214 N. C. 737; *Kirk* v. *City*

[48] This decision as well as the other New York cases cited in fns. 36 and 40, *supra*, pp. 40 and 44, are of especial significance because they arise under a New York statute (L. 1929, ch. 467; L. 1939, ch. 860, sec. 8) which waives the State's sovereign immunity in much broader terms than does the Federal Tort Claims Act. It contains no governmental-function exception analogous to 28 U. S. C. 2680 (a). Nevertheless, even without such an express exception, the New York courts hold that the State and its cities are not liable for the negligent performance of a governmental or discretionary function. *Ferrier* case, *supra*, and see *Barrett* v. *State of New York*, 220 N. Y. 423, 430–431; *Goldstein* v. *State of New York*, 281 N. Y. 396, 405, 406.

of Muskogee, 183 Okla. 536; *Martin* v. *Canton*, 41 Ohio App. 420; *Baker* v. *Waco*, 129 S. W. 2d 499 (Civ. App. Tex.).[49]

The basis for this rule is well stated in *Dorminey* v. *Montgomery*, *supra*, the leading case. Suit was instituted against the City of Montgomery for damages allegedly flowing from the failure of a traffic signal to operate. In holding that the

[49] The only cases *contra* we have found are the two on which petitioners rely, *Johnston* v. *City of East Moline*, 405 Ill. 460, and *Foley* v. *New York*, 294 N. Y. 275. In *Johnston*, the court held that the operation of traffic signals is not a governmental function. And in the *Foley* case, liability was imposed upon the state for the negligent maintenance of a traffic signal on the ground that the New York Vehicle and Traffic Law imposed a *mandatory* duty to maintain the signal. That no such mandatory duty has been imposed upon the Coast Guard in regard to navigational aids is clear. In the first place, 14 U. S. C. 81 provides that the Coast Guard "*may* establish, maintain, and operate" navigational aids (emphasis added). Secondly, this Court determined in the *Dalehite* case that Coast Guard activities are not performed pursuant to a mandatory duty, the violation of which may give rise to a cause of action in tort. 346 U. S. at 43–44. In discussing the Coast Guard, the Court cited *Steitz* v. *City of Beacon*, 295 N. Y. 51. In *Steitz*, the New York court emphasized that its earlier *Foley* decision rested on the legislative intent to protect the personal interests of particular individuals. In *Steitz*, where the statute was not mandatory, the city was empowered to maintain a fire department and to operate a system of waterworks for fire protection. The negligent failure to do so was held not actionable by a private person who suffered fire damage because the statute was not designed "to protect the personal interest of any individual" except as they were "members of the community" (295 N. Y. at 55). We believe this reasoning is equally applicable here. See also *infra*, pp. 52–58.

complaint, which was grounded on a theory of negligence, failed to state a cause of action, the Supreme Court of Alabama said (232 Ala. at 49):

> Traffic signal lights serve the purpose, and were so designed, to regulate the use of the streets, where installed. There is no duty enjoined by statute upon a municipality to install such signals, and, if installed, it is done in the exercise of a discretionary power, possessed by the municipality to conserve the safety of the public using such streets. * * *
>
> * * * The whole theory of plaintiff's case is predicated upon the theory of a duty owing the plaintiff by the city to maintain the signal lights in proper repair and working condition, in view of the fact that they had been installed, and had theretofore controlled the public making use of said streets, and upon which plaintiff relied to her injury.
>
> Nevertheless, we are of the opinion that the city, in installing the signal lights to warn and direct the traveling public, was exercising a governmental function, under its police power, and, this being true * * * was not answerable in damages to the plaintiff for any failure of the city, its agents, employees, or officers in permitting the traffic light to be or to remain out of repair.

Compare *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 227–228, where this Court said:

> [T]he city was under no legal obligation to furnish [water for fire protection]; and . . . voluntarily under-

c. We are justified in relying upon this group of cases, even though they may come from states without tort claims legislation, because the federal Act preserves the same immunity for federal governmental functions as these states have retained for themselves and their municipalities. See *supra*, pp. 17 *ff*. Moreover, as we have shown in fns. 25 and 36 *supra*, pp. 26, 40, and as the text of the opinions reveal, these state decisions rest on considerations of public policy which are equally applicable to the Federal Government and were recognized by Congress in enacting the Tort Claims Act. If the rule were not as this mass of cases settles it to be, the governing body would in effect be a guarantor of the perfect execution of its laws, and negligence in the performance of its governmental duties relating to the safety, health and welfare of the community would be actionable by anyone injured. "An intention to impose * * * the crushing burden of such an obligation should not be imputed to the Legislature in the absence of language clearly designed to have that effect." *Steitz* v. *City of Beacon*, *supra*, 295 N. Y. at 55. Cf. *Routh* v. *Quinn*, 20 Cal. 2d 488; *Young* v. *State*, 278 App. Div. 997, affirmed, 304 N. Y. 677. The recent decision of this

---

took to do more than the law required, it did not thereby subject itself to a new or greater liability. It acted in a governmental capacity, and was no more responsible for failure in that respect than it would have been for failure to furnish adequate police protection.

Court in *United States* v. *Gilman*, 347 U. S. 507, 510–513, underscores this reasoning. The Court there observed that, "The financial burden placed on the United States by the Tort Claims Act * * * raises important questions of fiscal policy." Recovery was denied in that case on a claim which, even though it was a product of the Tort Act itself, raised questions affecting fiscal policy and other internal relationships which Congress had left unanswered. As to these matters, the Court concluded, Congress alone should formulate the policy. Similarly here, to impose liability for the failure of a governmental activity to achieve its purpose suggests implications of vast proportions, financially as well as internally.[51] We think that Congress has unequiv-

[51] A claim of this kind, if actionable, opens the door to judicial inquiry into the internal operation of the whole complex of governmental activity. Thus, where the claim is based upon alleged negligence in the failure to maintain a general navigational aid, the complaint might present issues as to whether the Coast Guard was derelict in the type of equipment or device used, or in permitting a specific light to be unwatched, or in the nature and frequency of its inspection of the light, or in assigning particular personnel to a certain kind of duty, etc. Petitioners cite no authorities for permitting such inquiry into the internal management of the executive functions of government.

In this connection, we should point out that, at least as to the second and third charge of negligence levelled against the Coast Guard by petitioners (*supra*, pp. 5–6), it is possible to apply the "discretionary function" exception of Section 2680 (a); in the sense in which it was applied to the manufacture of FGAN in *Dalehite*. See *supra*, pp. 28–29. The

orally indicated a denial of this type of liability. But if it has not, then a decision of such import should await the specific expression of legislative policy.[52]

2. *If a duty at all, the obligation to maintain a lighthouse is owed to the public and a breach does not create private rights.*—a. Another formulation for the result reached in the cases we have discussed (*supra*, pp. 40 *ff.*), equally applicable as a bar to recovery in the instant action, is that the obligation is one which is owed to the public in general and not to particular individuals. Many statutes, particularly those which exercise police power, create uniform standards of conduct or duties which must be met by private persons. Breach of such statutory duties by a private person and the consequent injury to those intended to be protected will generally result in an actionable cause.[53] But the failure of a government to ful-

---

Coast Guard had to exercise administrative discretion as to the frequency of its inspection of navigational aids, and also as to the steps, if any, which it should take to notify vessels that a light is not functioning.

[52] Cf. *Dalehite*, 346 U. S. at 31: "[O]ur decisions have interpreted the Act to require *clear relinquishment* of sovereign immunity to give jurisdiction for tort actions" [emphasis added].

[53] *E. g.*, *Texas and Pac. R. Co.* v. *Rigsby*, 241 U. S. 33. But even here, the initial test is to determine whether the "statute gives a cause of action to a person injured by its violation, or whether it is intended as a general police regulation, and the violation made punishable solely as a public offense." *Amberg* v. *Kinley*, 214 N. Y. 531, 535-6. "The nature of the duty * * * and the benefits to be accomplished through its

fill its statutory undertakings to preserve the health and security of the community poses a distinct problem. The duties involved are public in nature and their violation normally does not create private rights. Cf. *German Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 227–228 (fn. 50, *supra*, p. 49); *Turner* v. *United States*, 248 U. S. 354, 358. In the absence of a clearly expressed contrary purpose, statutes and ordinances which undertake, through governmental action, to protect life and property "do not import intention to protect the interests of any individual except as they secure to all members of the community the enjoyment of rights and privileges to which they are entitled only as members of the public." *Steitz* v. *City of Beacon*, 295 N. Y. 51, 56; cf. *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160, 168. Where such statutes impose a specific duty upon a public official, his failure to perform or his negligent performance of his duty is regarded as a public injury, not a private wrong; a breach of such a public duty is punishable by some form of public prosecution, but not by way of a civil action by those who have suffered damage in

---

performance, must generally determine whether it is a duty to the public in part or exclusively, or whether individuals may claim that it is a duty wholly or in part for their especial benefit." *Hayes* v. *Michigan Central R. R. Co.*, 111 U. S. 228, 240. For example, a municipal ordinance requiring property owners to remove ice from sidewalks is generally held to create a duty to the public rather than to private individuals. *Taylor* v. *Lake Shore & Mich. S. Ry.*, 45 Mich. 74; *Restatement of Torts*, § 288, Comment a.

consequence of the default in duty. *South* v. *State of Maryland*, 18 How. 396, 402.[54]

This basis for immunity has been applied where the city or state has been sued for injury resulting from negligence in failing to provide adequate police protection,[55] fire protection,[56] and in other respects relating to safety and health.[57]

---

[54] It has sometimes been suggested that, if the employee who committed the allegedly wrongful act can be held liable personally to the injured plaintiff, the United States must be similarly liable under the Tort Claims Act. In this case, there are two answers to that contention. First, there is no necessary equivalence between the liability of the employee and that of the United States. While the liability of the employee may be a condition precedent to that of the United States (for the Act is based upon a respondeat superior or derivative theory of liability, hence a defense available to the employee should be available to his employer, see *N. O. & N. E. R. Co.* v. *Jopes*, 142 U. S. 18, 24), it does not follow that the United States is liable whenever its employee is. For example, an employee committing an assault can be personally held, but the United States cannot be sued because 28 U. S. C. 2680 (h) excludes liability for wrongs of this kind. Second, it is highly doubtful that a Coast Guard employee engaged in maintenance of a lighthouse owes any duty to any particular private person, which can be enforced by a private suit for damages. Like the Government's obligation, his responsibility is to the public as a whole and he owes no defined duty to any specific individual or group of individuals.

[55] *South* v. *State of Maryland*, *supra*; *Annala* v. *McLeod*, 122 Mont. 498; *Murrain* v. *Wilson Line*, 270 App. Div. 372, 377, affirmed, 296 N. Y. 845.

[56] *Steitz* v. *City of Beacon*, *supra*.

[57] See, e. g., *United States* v. *Price*, 95 F. 2d 687 (C. A. 5), certiorari denied, 305 U. S. 601 (negligent inspection of infected animals); *Meadows* v. *Mineola*, 190 Misc. 815, 817, 72 N. Y. S 2d 368 (negligent enforcement of building code).

As Mr. Justice Brandeis pointed out over thirty years ago, in a case where the sovereign had waived immunity, the fundamental obstacle to recovery in such situations "is not the immunity of a sovereign to suit, but the lack of a substantive right to recover the damages resulting from failure of a government or its officers" to fulfill their duties efficiently; in short, the claimant had no substantive right to recover prior to the consent to suit and there can be no recovery after the waiver unless the Act clearly indicates a purpose to create a new substantive right. *Turner* v. *United States*, 248 U. S. 354, 358 (destruction of property through mob violence and failure to keep the peace).

The principle has been applied in cases under the Tort Act. *National Mfg. Co.* v. *United States*, 210 F. 2d 263 (C. A. 8), certiorari denied, 347 U. S. 967 (negligence of Weather Bureau does not create private rights); *Clark* v. *United States*, 109 F. Supp. 213 (D. Oreg.) (negligence of Army in maintaining dikes); *Lacey* v. *United States*, 98 F. Supp. 219, 220 (D. Mass.) (negligence of Coast Guard in effecting a rescue); and see *The P. Dougherty Co.* v. *United States*, 207 F. 2d 626 (C. A. 3), certiorari denied, 347 U. S. 912 (same, under the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. 781 *et seq.*). For it is perfectly clear that the Tort Claims Act does not create any new substantive rights. *Dalehite* v. *United States*,

340 U. S. 15, 18; *Feres* v. *United States*, 340 U. S. 135, 142. And that there never was any legislative purpose to confer private actionable rights for the negligent maintenance of a lighthouse is obvious from the fact that the statutes through which the United States undertook that function were passed many years before Congress, by enactment of the Tort Claims Act, permitted suit for tort. E. g., Act of May 15, 1820, 3 Stat. 598; Act of June 23, 1874, 18 Stat. 204, 220.

b. Petitioners in this Court (Pet. Br. pp. 7–8), and much more pointedly in their brief below (pp. 15–16), argue that although the Coast Guard was under no obligation to establish and operate a lighthouse as a warning to mariners, once it voluntarily did so, knowing that vessels would rely upon it,[38] the Coast Guard was then under an *actionable* duty to exercise care to continue to maintain the light.[39] To accept this view would be to

[38] But note that the Light List apprised mariners that the Chandeleur Light was an unwatched light and that such lights "may become irregular or extinguished." See fn. 2, *supra* at p. 5.

[39] As between private parties, petitioners' argument received support in *Glanzer* v. *Shepard*, 233 N. Y. 236, 238, where a public weigher was held liable for negligence in weighing beans when he knew that the weight would determine the sales price. But in *Moch Co.* v. *Rensselaer Water Co.*, 247 N. Y. 160, 168, Judge Cardozo excluded the performance of public governmental duties from the scope of the *Glanzer* case. And in *Ultramares Corp.* v. *Touche*, 235 N. Y. 170, 183; he explained that the buyer was "in effect, if not in name, a party to the contract" of weighing.

impose liability on principles akin to those governing the liability of a Good Samaritan. See *Prosser on Torts* (1941), pp. 194–197. For the reasons already given (*supra*, pp. 52–56), the Good Samaritan doctrine can have no application to governmental activities. If it were adopted, virtually every governmental activity would fall within its reach, whether it be police protection, fire fighting, health regulation, traffic control, or any other activity undertaken to protect the safety and security of the citizenry. Such activities are always commenced by the Government voluntarily and with the knowledge and intention that the public will rely upon them. Their purpose, however, is to benefit the public at large, and it is not contemplated that private actionable rights will be created in the event of their negligent performance. Otherwise, the governing body would be held as a guarantor of their faultless execution. We repeat again the *Feres* and *Dalehite* admonition that the effect of the Tort Claims Act "is to waive immunity from recognized causes of action and was not to visit the Government with novel and unprecedented liabilities." 346 U. S. at 43.

This Good Samaritan argument was rejected in *National Manufacturing Co.* v. *United States*, 210 F. 2d 263, 278 (C. A. 8), certiorari denied, 347 U. S. 967; cf. *Jones* v. *United States*, 207 F. 2d 563 (C. A. 2), certiorari denied, 347 U. S. 921;

Elufera v. *Thomas*, 119 F. 2d 28 (C. A. 6). Its acceptance would necessarily collide with the Coast Guard portion of the *Dalehite* opinion (*supra*, pp. 30–32).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

SIMON E. SOBELOFF,
Solicitor General.
WARREN E. BURGER,
Assistant Attorney General.
PAUL A. SWEENEY,
LESTER S. JAYSON,
Attorneys.

DECEMBER 1954.

ating the lighthouses.[4] Traditionally, and properly so, this has always been regarded as an exclusively governmental function. Its objective being to promote the welfare of the nation as a whole by preventing disasters at sea and, at the same time, to facilitate the nation's commerce, the activity involves a characteristically public duty, entirely unlike any borne by a private person. While a private person may have a

---

[4] See our main brief, pp. 11–16. We referred there to the ninth statute enacted by Congress, the Act of August 7, 1789, 1 Stat. 53, under which the United States became responsible for the operational expenses of all existing lighthouses and other aids to navigation. While that Act carried a proviso that the expenses would not be paid after one year unless the navigational facility were ceded to the United States, later enactments provided for their payment even though a lighthouse had not been ceded, and extended the time of the states to make the cession. *E. g.*, 1 Stat. 137, 218, 251, 339, 393, 488.

The erection and maintenance of lighthouses has always been a governmental rather than a private function. The first lighthouse in America is said to be the one built by the Province of Massachusetts in 1716 at Boston Harbor. There were twelve lighthouses in existence when the present Federal Government was established. These had been built by the colonial governments during the period from 1716 to 1789, and, within a few years from the latter date, all were ceded to the Federal Government. George R. Putnam, *Lighthouses and Lightships of the United States* (1933), pp. 1–30; George Weiss, *The Light House Service* (*Brookings Institute, Service Monographs of the United States Government, No. 40*) (1926), pp. 1–3. The Coast Guard, whose files relating to this country's lighthouses reach back to 1837, advises us that they have no record of any privately operated lighthouse. In one or two instances, by special arrangement with the Coast Guard, a state has been authorized to maintain

duty to warn others of any hazard he has himself created and which foreseeably might endanger others (as when a private individual builds a bridge over a river, or a railroad crosses a public road), there is no duty imposed at common law which requires a private person to go upon a publicly travelled route and warn others of nature's perils, no less to take measures voluntarily which he thinks might promote safety in commerce. The maintenance of general navigational aids is a uniquely public function, closely akin to other public services carried on solely by government to promote the welfare of the community as a whole. If the function fails to achieve its objective, even though through negligence, no private right of action accrues.

More than 150 years ago, Congress was presented with a petition for private relief in a situation which is virtually identical to the one at bar. There were two small lighthouses at New-

---

general navigational aids, as in the case of New York which maintains the aids on its canal system.

The importance of the activity as a function of the Federal Government, from its beginning, is evidenced by the fact that the first volume of the Statutes at Large is replete with enactments relating to the establishment and operation of lighthouses by the Federal Government, *e. g.*, 1 Stat. 53, 137, 184, 218, 246, 251, 339, 353, 368, 393, 418, 426, 452, 464, 488, 540, 553, 607. That Congress early recognized this to be an obligation of government, rather than of private individuals, is also reflected in an appropriation in 1802 "for the reimbursement of the merchants of Plymouth and Duxbury, for monies expended by them in erecting a temporary light on the Gurnet * * *." 2 Stat. 151.

LIBRARY
SUPREME COURT, U.S.

Office - Supreme Court, U. S.
FILED
SEP 26 1955
HAROLD B. WILLEY, Clerk

No. 8

In the Supreme Court of the United States

OCTOBER TERM, 1955.

INDIAN TOWING COMPANY, INC., ET AL.,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

[redacted]
Solicitor General,
[redacted]
Assistant Attorney General,
[redacted]
[redacted]
[redacted]
Attorneys, Department of Justice,
Washington 25, D. C.

INDEX

CITATIONS

Cases: Page

Barnes v. *District of Columbia*, 91 U. S. 540 18
Bevilacqua v. *United States*, 122 F. Supp. 493 ..... 13, 14
Clark v. *United States*, 218 F. 2d 446 7
Costley v. *United States*, 181 F. 2d 723 14
Dalehite v. *United States*, 346 U. S. 15 ..... 2, 4, 5, 6, 12, 16, 19, 20
Feres v. *United States*, 340 U. S. 135 ..... 2, 4, 6, 19, 20
Geertson v. *United States*, 223 F. 2d 68 20
Ger. Alliance Ins. Co. v. *Home Water Co.*, 226 U. S. 220 6
Goodwill Industries of El Paso v. *United States*, 218 F. 2d 270 20
Martin v. *Bd. of Fire Com'rs for the City of New Orleans*, 132 La. 187, 61 So. 197 18
National Mfg. Co. v. *United States*, 210 F. 2d 263, certiorari denied, 347 U. S. 967 7
Panella v. *United States*, 216 F. 2d 622 ..... 17, 18
P. Dougherty Co., The v. *United States*, 207 F. 2d 626, certiorari denied, 347 U. S. 912 20
Pennsylvania R. R. Co. v. *United States*, 124 F. Supp. 52 ..... 14, 15, 16
Rayonier Incorporated v. *United State* C. A. 9, No. 14,329, September 1, 1955 ..... 5, 19
Texas City Disaster Litigation, In re, 197 F. 2d 771, affirmed *sub nom. Dalehite* v. *United States*, 346 U. S. 15 20
Turner v. *United States*, 248 U. S. 354 6
United States v. *Inmon*, 205 F. 2d 681 20
United States v. *Lawter*, 219 F. 2d 559 ..... 17, 18, 19, 20
United States v. *Spelar*, 338 U. S. 217 12
United States v. *Union Trust Company*, 221 F. 2d 62, pending on petition for certiorari, No. 296, October Term, 1955 ..... 3, 13, 14, 16–17

Statutes:

	Page
Act of August 7, 1789, 1 Stat. 53	8, 9
Act of August 12, 1955, 69 Stat. 707 (Pub. Law 378, 84th Cong.)	12, 13
1 Stat. 137	8, 9
1 Stat. 184	9
1 Stat. 218	8, 9
1 Stat. 246	9
1 Stat. 251	8, 9
1 Stat. 339	8, 9
1 Stat. 353	9
1 Stat. 368	9
1 Stat. 393	8, 9
1 Stat. 418	9
1 Stat. 426	9
1 Stat. 452	9
1 Stat. 464	9
1 Stat. 488	8, 9
1 Stat. 540	9
1 Stat. 553	9
1 Stat. 607	9
2 Stat. 151	9
Tort Claims Act:	
28 U. S. C. 1346 (b)	2, 3, 19
28 U. S. C. 2674	2, 3, 4
28 U. S. C. 2680 (a)	2, 3, 14
28 U. S. C 2680 (h)	7, 18

Miscellaneous:

1 *American State Papers, Commerce and Navigation* (1789–1815); p. 319	10
H. Rep. 1305, 84th Cong., 1st Sess	12, 13
2 *Journal of the House of Representatives (3rd and 4th Congress)*, p. 414	11
Prosser on Torts (1941), pp. 602–603	15
Putnam, George R., *Lighthouses and Lightships of the United States* (1933):	
pp. 1–30	8
pp. 27–28	10
S. Rep. 684, 84th Cong., 1st Sess	12
Weiss, George, *The Light House Service (Brookings Institute, Service Monographs of the United States Government, No. 40)* (1926), pp. 1–3	8

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 8

INDIAN TOWING COMPANY, INC., ET AL.,
PETITIONERS

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

I

Petitioners—in their main brief, their reply brief, their petition for rehearing, and in their brief on rehearing—consistently misconceive the nature of the Government's primary position in this case and thus they avoid coming to grips with the basic problem. They assume that the Government is defending the action on the theory that the claim arises out of the performance of an act of judgment or discretion and for that reason is barred by the discretionary function exception, 28

U. S. C. 2680 (a); they argue that the failure of the light in the lighthouse did not stem from the exercise of administrative or executive judgment; consequently, they say, the claim is not within the coverage of that exception.

But it is *not* our basic contention that the claim arises out of the performance of a discretionary function *in the sense that those words mean the exercise of judgment.*[1] Rather, our defense is based primarily on the view that the Tort Claims Act prescribes a "governmental function" exclusion from its coverage, an exception which includes the failure to maintain a lighthouse in working order (whatever the cause of that failure). In particular, our position is that the present claim fails to meet the analogous-private-liability requirement imposed by 28 U. S. C. 1346 (b) and 2674, as set forth in *Feres* v. *United States*, 340 U. S. 135, 141–2, and as applied in denying recovery for negligent fire-fighting and policing of the shipboard loading in *Dalehite* v. *United States*, 346 U. S. 15, 42–44.

Sections 1346 (b) and 2674 constitute the general grant of jurisdiction over certain claims. They permit suit against the United States on claims arising out of the negligent or wrongful acts or omissions of federal employees, but only "to the same extent as a private individual under like circumstances." Section 2680 (a) is a quali-

[1] See, however, fn. 51 of our main brief, pp. 51–52.

fication and limitation upon that general grant of jurisdiction. It is our position, at the outset, that petitioners' claim is not even within the grant of jurisdiction set forth in Sections 1346 (b) and 2674. In that view, it becomes unnecessary to look to Section 2680 (a). But when reference is made to Section 2680 (a), we submit that its provisions also bar the claim. For in our reading of Section 2680 Congress intended the "discretionary function" exception to encompass not only claims arising from the exercise of executive judgment, but, additionally, all claims based upon uniquely governmental acts. See our main brief at pp. 26–27, and at fn. 24, pp. 23–24; see also the Government's petition for certiorari in *United States* v. *Union Trust Co.*, No. 296, this Term. As we there suggest, a review of the cases relating to governmental liability, municipal and state, in which liability was denied on the ground that the claim arose out of a "discretionary function" reveals that in many instances the activity causing damage to the plaintiff did not involve the exercise of judgment, but did stem from acts uniquely governmental in nature. To the extent that the "discretionary function" concept derives meaning from cases involving uniquely governmental acts, even though no judgment or discretion is present, Section 2680 (a) overlaps or coincides with Section 2674. It is only in that sense that we rely on Section 2680 (a) in the instant case.

Our argument, briefly, is this: As this Court declared in *Feres, supra*, the Tort Claims Act itself prescribes "the test of allowable claims, which is, 'The United States shall be liable * * * in the same manner and to the same extent as a private individual under like circumstances * * *,' with certain exceptions not material here. 28 U. S. C. § 2674. It will be seen that this is not the creation of new causes of action but acceptance of liability under circumstances that would bring private liability into existence." Claims arising from acts of a "governmental nature or function" (see *Dalehite,* 346 U. S. at 28, 32, 42–44) cannot meet this test. For when such a claim is viewed in "all the circumstances," as the statute requires (*Feres, supra,* at 141, 142; *Dalehite, supra,* at 43), there can be no proper private analogy or parallel private liability. Private persons normally do not engage in such activities—like regulating commerce, or fire-fighting, or preserving the peace; they are under no obligation to do so and normally do not have the authority and power to undertake the activity; accordingly, they would not find themselves "under like circumstances."[2]

---

[2] Thus, in *Feres*, speaking of the uniquely governmental relationship between the United States and its soldiers, the Court said: "Nor is there any liability 'under like circumstances,' for no private individual has power to conscript or mobilize a private army with such authorities over persons as the Government vests in echelons of command." In

When the gist of the claim is the misfunctioning or inadequate performance of the governmental activity itself, or the failure to attain the ultimate objective of that activity, no cause of action accrues. That is, when the plaintiff's complaint is that he did not receive the benefit of a public activity which is specially or uniquely governmental, and which would have been of help to him if properly carried out, there can be no recovery under the Tort Claims Act. Illustrative of such claims are those in which the plaintiff asserts his interests were damaged by reason of negligent health inspection, or negligent weather reporting, or negligence in regulating the sale of securities, or failure to arrest a criminal—activities which are clearly governmental. These claims are distinguishable from those in which the plaintiff's complaint is not that he failed to receive the ultimate benefit of a uniquely public function without private parallel, but rather that his interests were directly damaged by improper performance of a particular activity which the government does undertake along with private individuals—where, in other words, the negligence

---

Dalehite, 346 U. S. at 42–44, the principle was applied with reference to the Coast Guard's allegedly negligent acts in policing the shipboard storage of the fertilizer and in fire-fighting. Other cases applying the principle are noted at p. 34 of our main brief. And see the recent decision of the Ninth Circuit in *Rayonier Incorporated* v. *United States* (No. 14,329, Sept. 1, 1955), discussed *infra*, fn. 15, p. 19.

occurs in the course of some intermediate step which does have a private parallel, for example, damage caused by negligence in *driving a truck* to a fire, in *erecting a tower* for weather forecasting, in *repairing the steps* of a post office building. Unquestionably, a person may obtain legal redress for negligent driving or negligent repair of a building, but the common law confers no actionable right if "he suffer loss because the carrier delayed in hauling the mail; or the policeman failed to walk his beat, or the fireman delayed in responding to an alarm, or the engine proved defective, resulting in his building being destroyed." *Ger. Alliance Ins. Co.* v. *Home Water Co.*, 226 U. S. 220, 231.

As noted in our main brief (pp. 54–55), the reason there is no liability is not because of the immunity of the sovereign to suit, but because of this lack of a substantive common law right to recover damages resulting from failure of a government or its officers to perform their public duties efficiently; therefore, even when a statute waives immunity, such a claim is not actionable unless the act creates a new substantive right. *Turner* v. *United States*, 248 U. S. 354, 358. It is settled, of course, that the Tort Claims Act does not create new substantive rights—it only permits recovery where the claim has analogy in the private law of torts. *Dalehite*, *supra*, 346 U. S. at 43–44; *Feres*, *supra*, 340 U. S. at 142. "Its effect is to waive immunity from recognized

causes of action and was not to visit the Government with novel and unprecedented liabilities." *Ibid.*

In the present case, the gist of the complaint is not that the United States created any hazard in the sea which caused the grounding of petitioners' tug; the essence of the complaint is that the grounding of the tug would have been averted if the United States had maintained a warning light marking the hazard. Failure to maintain the light affected the plaintiffs only insofar as it led to a failure to warn the ship of a navigational danger and to protect it from the shoals. The core of the claim, then, is that the Coast Guard negligently failed to accomplish its purely governmental objective of aiding mariners and of preventing a maritime accident. Such a claim is not within the coverage of the Tort Claims Act.[3]

II

We have already shown that, since the very beginning of the nation, the United States has assumed the obligation of establishing and oper-

[3] Even apart from the governmental function exclusion, a claim arising out the negligent performance of a public warning service is barred by the negligent misrepresentation exception of the Act, 28 U. S. C. 2680 (h). See *National Mfg. Co.* v. *United States*, 210 F. 2d 263, 275–276 (C. A. 8), certiorari denied, 347 U. S. 967, and *Clark* v. *United States*, 218 F. 2d 446, 452 (C. A. 9), both holding that the Act excludes claims based upon erroneous warnings concerning the dangers of floods.

buryport Harbor built by Massachusetts in 1788 on Plum Island at the entrance to the Merrimac River, which were later turned over to the Federal Government. The range of these lights marked the channel into the river. See George R. Putnam, *Lighthouses and Lightships of the United States* (1933), pp. 27–28. A vessel was lost, assertedly because of the negligence of the lighthouse keepers, and the owners petitioned Congress for indemnity. A House Committee considered the claim and recommended rejection in a report submitted January 11, 1796 (4th Cong., 1st Sess.), which is as follows (1 *American State Papers, Commerce and Navigation* (1789–1815), p. 319):

> William Smith and Joshua Carter state that they were owners of the ship Friendship, that sailed from Newburyport in August, 1794, and that the said ship, on her return to Newburyport, in September last, was lost by attempting to get into said place, in consequence of the negligence of those persons employed by Government to superintend the two lights there, in not having one of those lights (which is a moveable one) put into a position so as to correspond with the leading marks to enter into the said harbor, and which had been undermined by a storm, about fourteen days previous to the loss of the said ship: they, therefore, pray, inasmuch as their ship was lost by following false guides, through the negligence of persons em-

ployed by Government, whose business, they say, it was, and who had sufficient time, to have repaired the injury, and, particularly, as those persons are not responsible for any neglect, that indemnification should be made them by the United States.

On this petition the committee would observe, that, although the tonnage money, paid by the holders of ships, for the purpose of supporting light houses, involves a duty, on the part of Government, to take, generally, such prudential measures as will embrace the object, yet it cannot be supposed that Government, while it was extending a convenience for the good of the citizens, ever contemplated it should be responsible for any losses that might accrue, in consequence of that convenience being incomplete in any instance arising from the neglect or omission of any of its agents, or from any other cause. They are, therefore, of opinion, that the prayer of the petition of William Smith and Joshua Carter cannot be granted, and that they have leave to withdraw the same.[5]

This report persuasively demonstrates the Congressional view, as far back as 1796, that in undertaking to provide aids to navigation the United States does not act as a guarantor or an insurer

[5] The House subsequently rejected the claim. 2 *Journal of the House of Representatives (3rd and 4th Congress)*, p. 414.

of their faultless performance.[6] The language and the legislative history of the Tort Claims Act reflect a similar view in that Congress carefully excluded from the coverage of the Act claims based upon the performance of a governmental function. *Dalehite*, 346 U. S. at 27–28, 32, 42–44.[7]

---

[6] The Light List today warns mariners that unwatched lights, such as the Chandeleur Island Lighthouse, "may become irregular or extinguished." See fn. 2, at p. 5 of our main brief.

[7] In our main brief (p. 17), we noted Congress' awareness that, because of the exclusions and limited coverage of the Tort Claims Act, there would still be occasion for the private bill remedy. Cf. *United States* v. *Spelar*, 338 U. S. 217, 221. Thus, Public Law 378, 84th Congress, the Act of August 12, 1955, 69 Stat. 707, provides compensation for those who suffered damages by reason of the Texas City disaster (which was the subject of the *Dalehite* case). It is interesting to note that the House Committee Report (H. Rept. No. 1305, 84th Cong., 1st Sess.) on the bill denies "any equitable or legal responsibility on the part of the United States" (*ibid.*, p. 3), stating that "the committee is of the considered opinion that the Federal Government was in no way negligent or otherwise responsible for the explosions" (*ibid.*, p. 7); it nevertheless recommended the measure "for compassionate reasons" (*ibid.*, p. 3) and contemplated that the awards would be "gifts in the nature of disaster relief" (*id.*, pp. 8–9). And the Senate Report (No. 684, 84th Cong., 1st Sess.), while stating that it believed the United States should be responsible because it had control of the project (*ibid.*, p. 5), states with reference to this Court's decision in *Dalehite* (emphasis supplied): "It should be emphasized however, that, in adopting House Resolution 296 [providing for an investigation of the Texas City claims against the Government], *Congress was not attempting to supersede or invalidate the controlling decision of the Supreme Court, laid down in the Dalehite case.* Congress, prior to the pas-

III

The cases relied on by petitioners in their main brief have already been discussed (see our main brief, pp. 35–37). We turn now to the additional authorities referred to in their subsequent briefs, *i. e.*, their reply, their petition for rehearing, and their brief on rehearing.

Petitioners (Reply, pp. 2–5) rely on the *Bevilacqua*,[8] the *Union Trust Company*,[9] and the

---

sage of the Tort Claims Act, repeatedly entertained claims and concerned itself with legislation which provided relief for parties in situations analogous to that submitted to the committee for investigation. In addition, since the passage of the Tort Claims Act, Congress has invariably exercised its jurisdiction to legislate when it was satisfactorily established that for compassionate reasons or in equity and in good conscience remedial legislation was necessary to fill a void created by existing law." *Ibid*, p. 8.

As enacted, the bill does not permit an award in excess of $25,000 on any claim and bars subrogated insurance company claims. The limitation and restriction were invoked, as the House Report (*supra*, at p. 9) indicates, because "the awards are intended as gratuities" (and see *id.*, p. 3). Also in recognition of this attitude, Section 1 of Public Law 378 provides as follows:

> The Congress recognizes and assumes *the compassionate responsibility* of the United States for the losses sustained by reason of the explosions and fires at Texas City, Texas, and hereby provides the procedure by which the amounts shall be determined and paid. [Emphasis supplied.]

[8] *Bevilacqua* v. *United States*, 122 F. Supp. 493 (W. D. Pa.).

[9] *United States* v. *Union Trust Company*, 221 F. 2d 62 (C. A. D. C.); now pending before this Court on petition for certiorari, No. 296, this Term.

South Amboy Explosion[10] cases for two propositions: first, that the discretionary function exception, 28 U. S. C. 2680 (a), does not apply if the negligent act causing injury occurs *after* the discretionary function has been exhausted (*e. g.*, negligence during an operation following the discretionary determination to admit a non-military patient into a military hospital, *Costley v. United States*, 181 F. 2d 723 (C. A. 5)); and, second, that the discretionary function exception applies only to high level policy decisions but not to discretionary acts at an operational level.

We do not dispute the first proposition; we seriously question the second (see the Government's petition for certiorari in *Union Trust Company*, No. 296, at pp. 30–35). But the short of the matter is that neither of these propositions is before the Court in the present case, for, as already noted (*supra*, pp. 1–3), the present case does not turn on the presence or absence of judgment or choice or discretion.

Although petitioners do not discuss these three cases from the viewpoint of the analogous-private-liability requirement or the governmental function exclusion, reference to that aspect of the cases is appropriate. *Bevilacqua*, which petitioners regard as "exactly parallel" to the case at bar (Reply, p. 2), is far from it. Liability was

[10] *Pennsylvania R. R. Co.* v. *United States*, 124 F. Supp. 52 (D. N. J.).

imposed because of the Army's negligent failure to light up lanterns on the locks of a dam, which it built, resulting in the death of two fishermen whose boat went over the dam at night. Unlike the present case, the Government had itself created a structure which constituted a dangerous condition, a structure comparable to many erected by private persons. That case would seem to fall within the ambit of the rule of private tort liability that an individual is liable if he erects a structure or uses his property in a manner which is unreasonably dangerous to persons in the vicinity. *Prosser on Torts* (1941), pp. 602–603.

We believe that the decision of the New Jersey District Court sustaining the complaints in the South Amboy, N. J., explosion litigation (*Pennsylvania R. R. Co.* v. *United States*, *supra*)[11] is

[11] The explosion at South Amboy occurred in 1950 while lighters were being loaded with explosives which had been manufactured and transported by private firms pursuant to a private contract of sale with a foreign country. The United States had no connection with the transaction, but, through the Coast Guard, had issued an emergency permit allowing the explosives to be loaded on a private vessel anchored at South Amboy, and had a Coast Guardsman at the pier to police the shipboard loading. The explosion resulted in 31 deaths and more than 12,000 persons claimed property damage. In addition to suing the manufacturers of the explosives, the carriers, and the lighterage company, the claimants brought numerous actions against the United States under the Tort Claims Act alleging negligence of the Coast Guard in the issuance of the permit without investigating certain factual representations made by those who

totally irreconcilable with this Court's decision in *Dalehite*, 346 U. S. 15. In *Dalehite* the Court held squarely that Coast Guard "dereliction of duty in failing to police the shipboard loading" and "in failing to supervise the storage" of a commodity is not within the coverage of the Act (346 U. S. at 23–24, 42); in the *South Amboy* case, the district judge held it is (124 F. Supp. at 65). It is difficult to conceive of a function so typically governmental and so lacking in private counterpart as the enforcement of law. In view of the dispositive holding in *Dalehite*, the district court's contradictory ruling in *South Amboy* does not have great weight.

Union Trust Company[12] does have a bearing

---

had sought the permit, and in failing to discover violations of, or to enforce compliance with, safety regulations.

The United States moved to dismiss the complaints contending that the claims were barred by Sections 2674 and 2680 (a). Denying the motion, the district judge held that the discretionary function exception does not extend to so-called operational level activities, that the duty of the Captain of the Port of New York to investigate the applicant's factual representations before issuance of a permit was an operational level duty not covered by the discretionary function exception. 124 F. Supp. at 64. Similarly, the duty of the Coast Guardsman, who was on the pier, to police the loading and to enforce safety regulations was held to be operational, and breach of that duty was held to be actionable. *Ibid.*, at 64–65. There being no final judgment, that decision is not ripe for appeal.

[12] That case involves a mid-air collision between two planes coming in for a landing on the same runway. Civil Aeronautics Administration employees, who regulate air traffic in a control tower at the airport, were found negligent in

on this case, as our petition in No. 296 indicates. But it should be noted that there the court purported to acknowledge the governmental function aspect and the analogous-private-liability requirement of Section 2674, holding—mistakenly, we believe—that the regulation of air traffic does have a private counterpart. The court relied on the fact that, before the Civil Aeronautics Administration came into being and took over the function of regulating air traffic through the control towers, private individuals erected and operated such towers, and still do in some instances, and therefore no governmental function was involved. 221 F. 2d at 74. While we believe this reasoning to be fallacious—for the reasons stated in the Government's petition in that case—the fact is that in the present case petitioners cannot even point to such a "private analogy"—the operation of lighthouses has always been a function of government and never a private undertaking.[13]

---

failing to warn each plane of the other's activities, and in clearing both planes to land on the same runway at the same time. The court held that the Tort Claims Act permits the imposition of liability for negligent regulation of air traffic by the control tower. Such regulation, it held, is operational level activity and not within the discretionary function exception. The United States has filed a petition for certiorari, No. 296, this Term.

[13] Apart from the *Lawter* case, discussed *infra*, perhaps reference should be made to three other cases mentioned by petitioners: *Panella* v. *United States*, 216 F. 2d 622 (C. A. 2), involving an attack by one inmate upon another inmate of a

2. In their Petition for Rehearing (pp. 3–5), petitioners assert that in the subsequent case of *United States* v. *Lawter*, 219 F. 2d 559 (C. A. 5), where liability was imposed for Coast Guard negligence in the conduct of a helicopter air-sea rescue, the court below "disavowed" its decision in the present suit. Actually, there was no such disavowal; the court simply held that *Indian Towing* was not controlling in the light of the facts in the *Lawter* case.[14] The opinion distin-

---

federal institution, relates solely to the assault and battery exception of the Tort Claims Act, 28 U. S. C. 2680 (h). No question concerning governmental functions was before the appellate court, and the Second Circuit carefully refrained from injecting it into the case. See 216 F. 2d at 623, fn. 2. *Martin* v. *Bd. of Fire Com'rs for the City of New Orleans*, 132 La. 187; 61 So. 197, held the city liable when its horse-driven fire truck, in a trial run, negligently ran down a pedestrian. The case is irrelevant; we do not contend that driving a truck in such circumstances is a characteristically governmental function (see our main brief, pp. 22–23). *Barnes* v. *District of Columbia*, 91 U. S. 540, accords with the usual rule in this country that a city is liable for a defective condition of its streets.

[14] A wave swamped decedent's boat, stranding her in rough water some four feet deep about 500 yards from shore. She was sighted by a Coast Guard rescue helicopter which dropped a cable to her, began raising her, but before she could be lifted into the cabin, she lost her grip and fell to her death. In a Tort Claims Act suit, the trial court found that the Coast Guardsman operating the cable had had no training in rescue work, and that the Government was negligent in not having the rescue operation conducted by an experienced man who was available in the helicopter. Liability was imposed, and the Fifth Circuit affirmed primarily on the basis of a volunteer's liability at common law.

guished the present case on two grounds: (a) that *Indian Towing* involved a negligent omission while *Lawter* involved affirmative negligent conduct, and (b) that the facts in *Lawter* called for application of the Good Samaritan doctrine, *viz.*, if a volunteer attempts to aid another, and takes control of the situation, he is liable if he fails to use reasonable care until the emergency ends, or if he negligently leaves the other in a worse condition. We believe *Lawter* is wrong in both aspects.[15] But even accepting *Lawter* as being

[15] The Tort Claims Act certainly draws no distinction between negligent acts of omission and acts of commission either in claims on which liability may be imposed or in claims which are excluded from its coverage. 28 U. S. C. 1346 (b). The Good Samaritan doctrine, on the other hand, can have no application when the claim arises out of the performance of a governmental function; otherwise that exclusion would be nullified. See our main brief at pp. 56–58, and see the recent opinion of the Ninth Circuit in *Rayonier Incorporated* v. *United States* (C. A. 9, No. 14,329, Sept. 1, 1955). Rayonier brought an action for damage to its property from fire, alleging, *inter alia*, that the Forest Service was negligent in the manner in which it fought a forest fire, that it negligently failed to suppress the fire and permitted it to spread to its land. Affirming dismissal of the complaint for failure to state a cause of action, the Ninth Circuit applied the test of Section 2674, observed that the suppression of fires by Forest Rangers is a public function, quoted the portion of the *Dalehite* opinion which in turn quotes *Feres*, and concluded that, "In our opinion the Dalehite case compels the conclusion that the Government, when intervening in the prevention and control of forest fires, *may not be said to assume the common law obligation of a volunteer*" (slip op. pp. 4–5, emphasis added).

a correct exposition of the law, it has no relevance to the instant case for the court below in *Lawter* did not in any manner repudiate the requirement of analogous-private-liability. It should be noted, in this aspect, that the court did not address itself to the governmental function exclusion, did not refer to or cite Section 2674, or *Feres*, or *Dalehite*, and for that reason it may fairly be inferred that the court believed—rightly or wrongly—that a Coast Guard rescue operation is not a uniquely public function, but one which has a private counterpart.[16] For, in other cases apart from *Indian Towing*, the Fifth Circuit has fully adhered to the dictate of Section 2674 that as a condition precedent to recovery there must be a private law analogy. *Goodwill Industries of El Paso* v. *United States*, 218 F. 2d 270, 272 (C. A. 5); *United States* v. *Inmon*, 205 F. 2d 681, 684 (C. A. 5); *In re Texas City Disaster Litigation*, 197 F. 2d 771, 780 (C. A. 5), affirmed *sub nom. Dalehite* v. *United States*, 346 U. S. 15. The

[16] Compare *The P. Dougherty Co.* v. *United States*, 207 F. 2d 626 (C. A. 3), certiorari denied, 347 U. S. 912, holding that liability may not be imposed on the United States under the Public Vessels Act for Coast Guard negligence in a rescue operation at sea, with *Gerrtson* v. *United States*, 223 F. 2d 68, 70 (C. A. 3), holding that liability may be imposed under that Act when the Coast Guard, having come to the aid of a rudderless motorboat, was negligent in towing it to dock, "a task no different from that undertaken daily by tug boats in every busy harbor."

patent defect in petitioners' claim here is that there is no private liability "under like circumstances," for no private individual would ever find himself in like circumstances;—no one other than the Government maintains a lighthouse service to promote safety at sea and to foster the nation's commerce.

Respectfully submitted.

SIMON E. SOBELOFF,
Solicitor General,
WARREN E. BURGER,
Assistant Attorney General,
PAUL A. SWEENEY,
LESTER S. JAYSON,
Attorneys.

SEPTEMBER 1955.

U. S. GOVERNMENT PRINTING OFFICE: 1955